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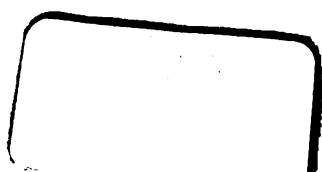
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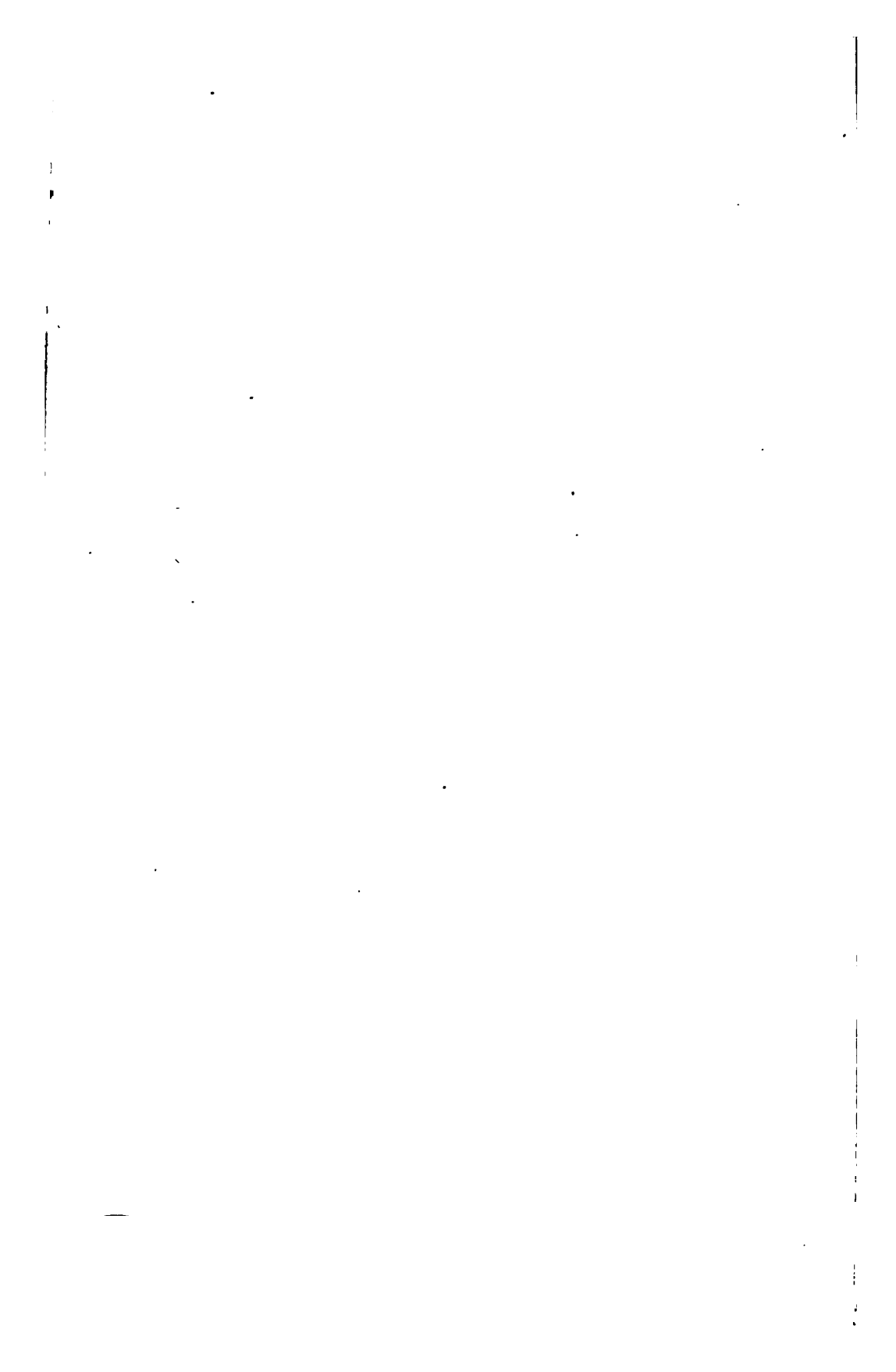
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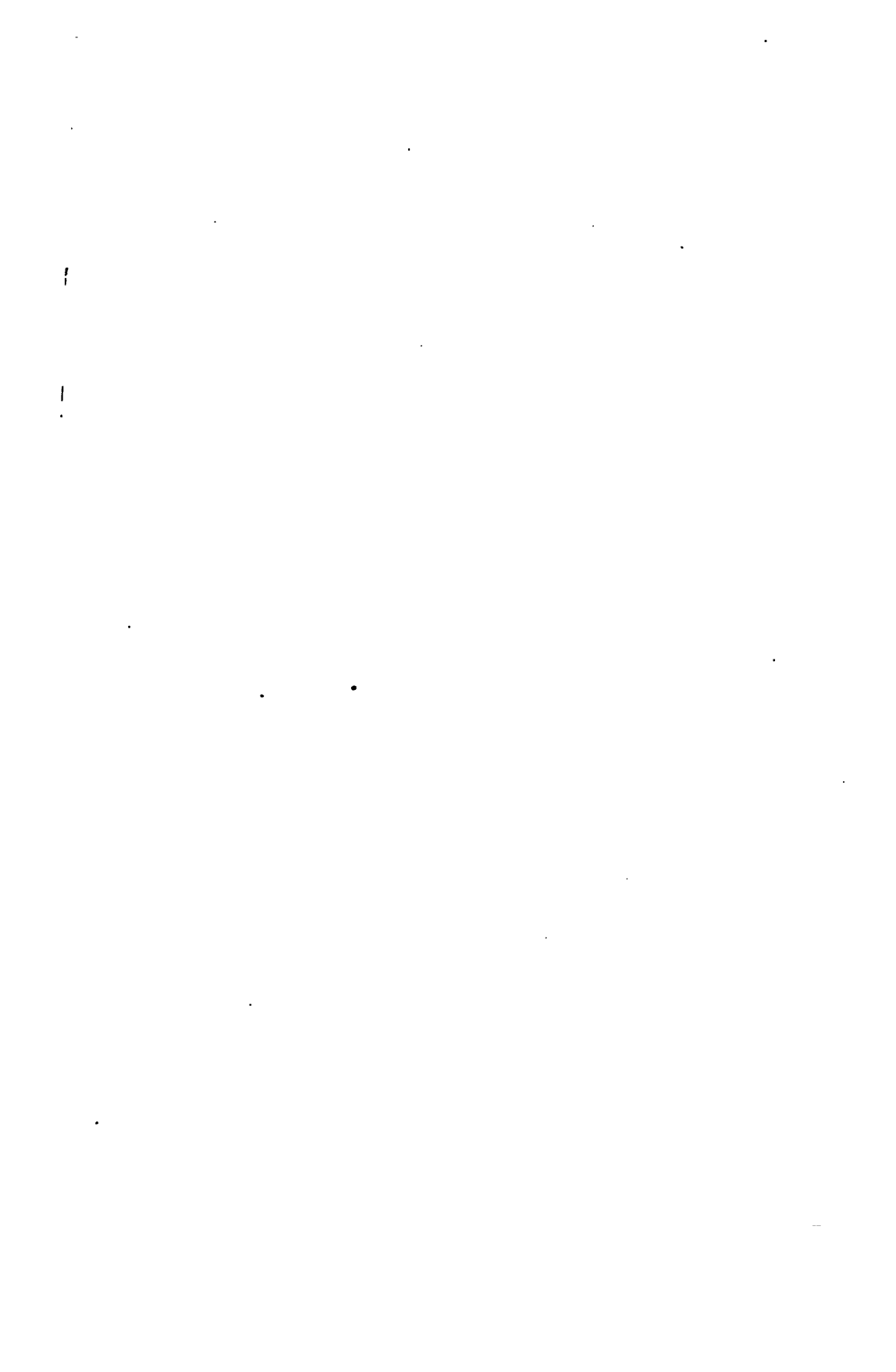
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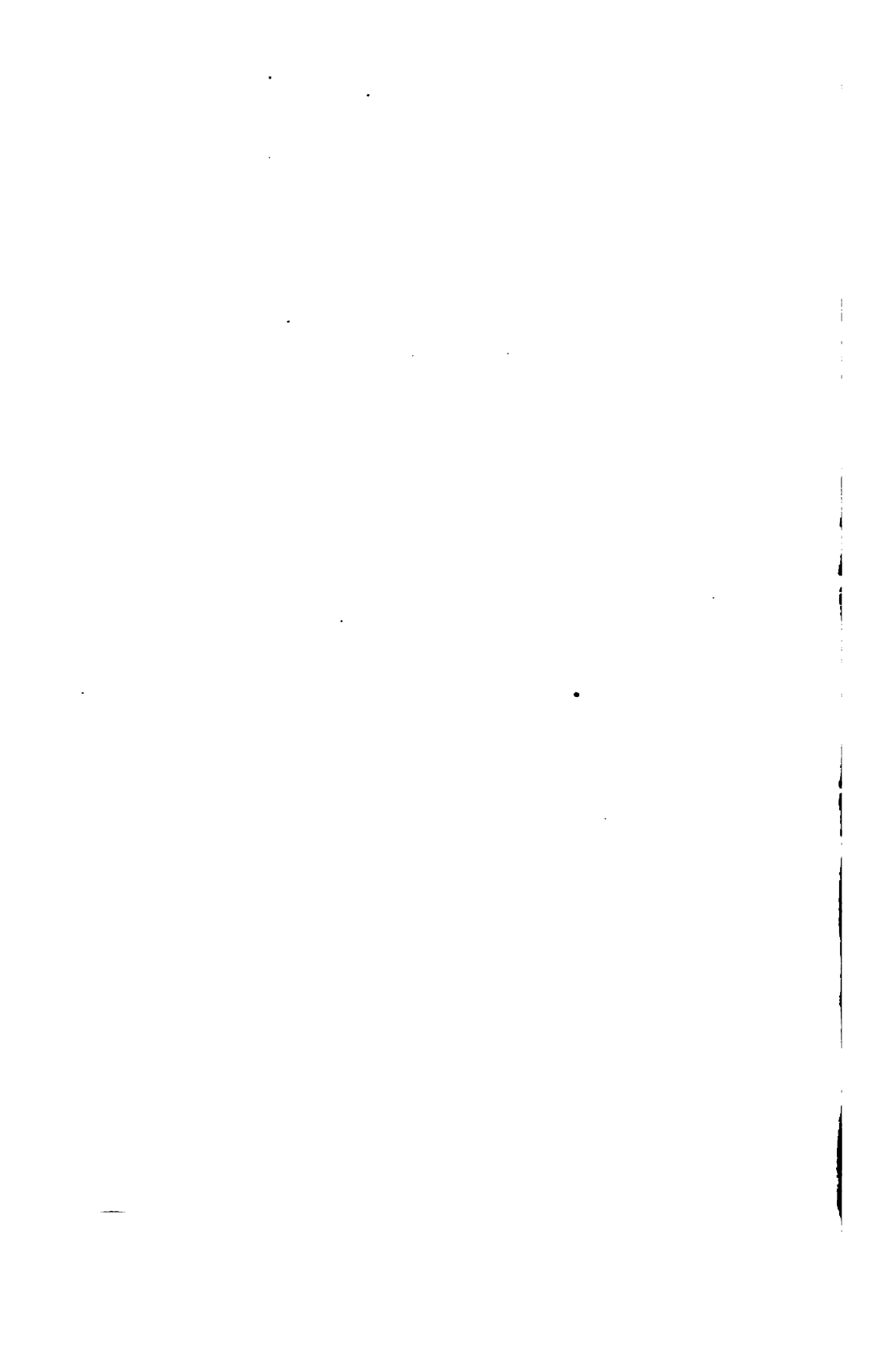
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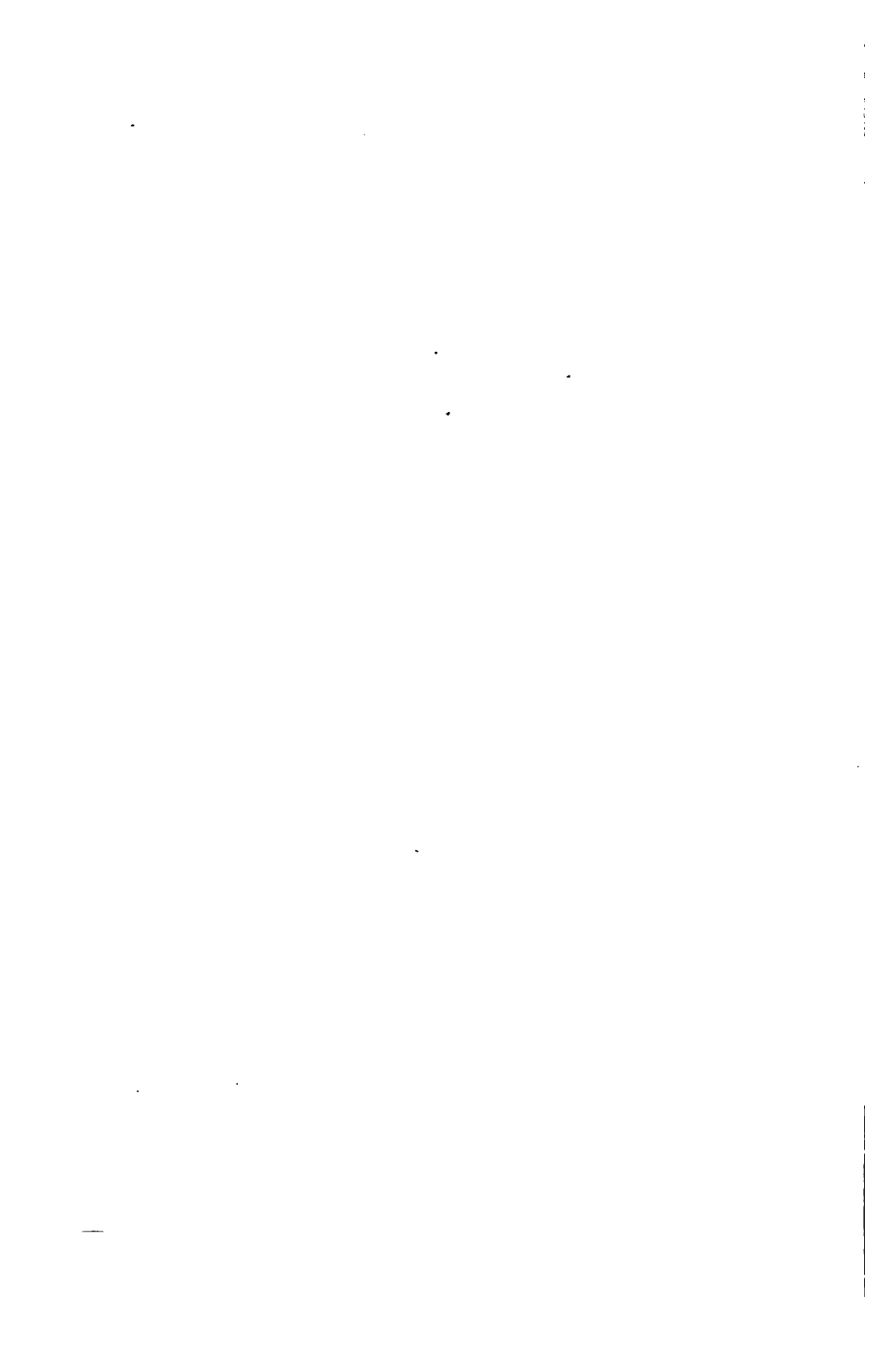








THE POWER OF SPECIAL TAXATION



A TREATISE ON

THE POWER OF SPECIAL TAXATION

**A CRITICAL ANALYSIS OF SPECIAL TAXES FOR LOCAL
AND PUBLIC IMPROVEMENTS, CONSIDERED WITH
REFERENCE TO THE CONSTITUTION, STATE
AND FEDERAL, AND THE RESTRIC-
TIONS THEREIN CONTAINED**

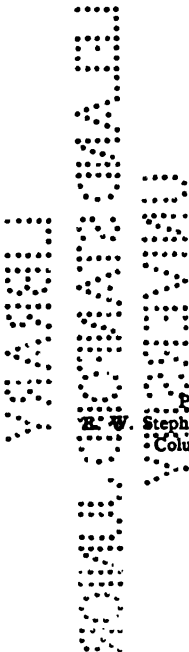
BY HENRY N. ESS
of the Missouri Bar

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TO

JOHN H. LATHROP,

SOMETIME PRESIDENT OF THE UNIVERSITY OF MISSOURI,
MY NOBLE AND DISINTERESTED PRECEPTOR;
FRIEND AND COUNSELOR IN EARLY LIFE WHILE
I WAS A POOR COUNTRY BOY,
IN MEMORY OF THE PRICELESS SERVICES HE RENDERED
ME AND OTHERS IN THE PERFECT PERFORMANCE
OF HIS DUTY AS TEACHER,
FRIEND AND COUNSELOR IN MY LIFE WORK,
I DEDICATE THIS BOOK.

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7th. 1888
L. C. C.

PREFACE.

There are very few persons in the United States, who understand and fully appreciate the fact that the power of local taxation of real estate in our cities, towns and villages is absolutely without limit except the whole value of the land taxed and the whole value of all houses and other improvements thereon.

In its origin on the original theory on which it was founded, the money raised by local taxation was applied to the benefit of the person and property taxed. The benefit to the person and property taxed was equal to or greater than the amount of the tax. This is given as the sole reason for compelling the owner of real estate to pay for work and material which he did not want and for which he made no contract or agreement.

Before the citizen can be compelled to give up his property in the interest of the public good under any legislative act, the evidence should leave no reasonable doubt as to the fact, the character and amount of benefit. The evidence should be the same as that required to prove a resulting trust. The unlimited power of the English Parliament should not have been given to our city councils. But our city governments in the United States have and exercise greater power. No Parliament in England from Runnymede to the present hour has ever yet undertaken to make an actual damage a real benefit.

Our city councils should not be compelled to serve two masters having opposing interests, one master being the abutting property-owner and the other, the balance of the public. Our common councils are not judicial tribunals to hear and weigh impartially the evidence offered and render a judicial decision on notice and hearing. No man can serve two masters. This principle is deeply imbedded in human nature. It was the divine judgment of Jesus Christ, enunciated more than eighteen centuries ago. It is a source of deepest regret that our American courts should dare to reverse this judgment of Jesus Christ. His decision has been effectually overruled by all our American courts. We no longer make parks, boulevards, pavements; we now make money. The park, the boulevard, the streets, are the mere by-products of our moneymaking.

Grading a street may be a benefit or a damage to abutting property. The tax is levied and the tax-bills issued after the work is done. We do not grade streets under the tax-power. If the grading cause a damage, that damage is done before the levy of the tax or the issue of the tax-bills.

The tax-power can not make that a benefit which was and is a damage. The street is just as good to travel on without the tax-bill as with it. The tax-bill ordinance does not make the street any better to travel on.

Keating v. Skiles, 72 Mo. 97 (A. D. 1880); *Keating v. City of Kansas*, 84 Mo. 415 (A. D. 1884); *Keith v. Bingham*, 100 Mo. 300 (A. D. 1889); *Smith v. Kansas City*, 128 Mo. 23 (A. D. 1894); and *McQuiddy v. Smith*, 67 Mo. App. 205 (A. D. 1896), were all grading cases.

Keating graded Bell street to the benefit of adjoining lots and of the City of Kansas and he failed to recover from the lotowners and from the city. While in *Keith v. Bingham*, 100 Mo. 300, the contractor's assignee recovered on the tax-bills notwithstanding the fact that the grading damaged the lot and just compensation for such damages was not paid. Where the grading was a benefit the contractor could not recover; where it was a damage he could.

In *Smith v. Kansas City*, 128 Mo. 23, Mrs. Smith recovered \$2,750 against Kansas City because the grading damaged her property that much, while in *McQuiddy v. Smith*, 67 Mo. App. 205, the contractor recovered against Mrs. Smith \$300 for the same grading, the grading being a benefit in the tax-bill suit.

The graded street may be better or worse to travel on than the ungraded street, but the tax-bill does not make it any better or any worse to travel on either to the public or the abutting property-owner.

The American constitutions (state and national) have imposed certain restrictions on the powers of the government. These restrictions apply to all branches of the government, executive, legislative and judicial.

Private property shall not be taken or damaged for public use without just compensation, and such compensation shall be ascertained by court and commissioners, or by court and jury, and this just compensation shall be paid in advance.

Of course this is not a restriction on the tax-power *eo nomine*. Certain things are prohibited from being done. The things are prohibited, not the names. The state legislatures do the things they are prohibited

from doing and then tax the injured persons and property to pay for doing the prohibited things. This is done in the interest of the public and against the person and property designed to be protected. May the state legislatures authorize cities, towns and villages to do the things the state constitutions prohibit them from doing and then tax the injured person and property (the very person and property designed to be protected by the restriction) for doing such injury?

Now, all such constitutional restrictions have ceased practically to be such restrictions or prohibitions, and have become provisions authorizing state legislatures to enact laws enforcing the prohibited things and then authorizing local taxes to pay for doing the prohibited things. Such tax laws are constitutionally valid notwithstanding the acts done are in plain terms prohibited. On the same principle, legislatures may enact laws for doing all other prohibited things and then enact laws for local taxes (or general taxes) to pay for doing such prohibited things; such local taxes are held constitutionally valid notwithstanding the acts done (for which such taxes are levied) are prohibited in plain terms. Here is a distinct prohibition. This is quite different from a mere want of authority. If the Legislature may do one prohibited thing and tax locally the injured person and property designed to be protected, then the Legislature may do all the acts prohibited and tax the injured person and property to pay for them.

In the American states all constitutional barriers have been swept away, as much now as in the days of the French Revolution, when the Dantons, the Robe-

spierres and the Marats were in the zenith of their power. Tax-bills are now in the same condition as municipal bonds. Although the bond is a contract, the tax-bill is not; but it is founded on contract—the contract to do public work.

The public work contracted to be done may be ruinous to the property taxed and to the property-owner, yet the tax-bills issued for doing this injury are sacred constitutional obligations and valid to all intents and purposes in the hands of the original wrongdoer. Our state constitutions rival the constitution of Hell and far exceed it in iniquity. I do not believe that the framers of our state constitutions ever intended that the property-owner should be taxed to pay for damaging his own property.

In the establishment of this judicial iniquity, all sorts of thrusts, insinuations and innuendoes are indulged against those who oppose or even question the enforcement of such unrighteous laws and ordinances. The vilest epithets known to the language are applied to them. Those who favor the iniquitous system are enterprising; they are public spirited; they aim to accomplish the public good. They deify the public good. That which they take to be good is really bad. The French Revolutionists deified a strumpet for the Goddess of Liberty. We have followed their example. The Devil always makes a good argument (i. e., apparently good). But in the American tax-bill the Devil has fairly outdone himself.

The courts have authorized and sanctioned combinations of the few, the powerful in finance and intellect against the weak deserving protection against those unsuspecting.

Very many times the suspicions of the multitude are justifiable: That public office is a private snap; that it confers on the officeholder the right to sell his vote to the highest bidder for cash in advance.

We must return the Scotch verdict: "*Guilty, but not proven.*" Quo Vadimus?

In the rapids of Niagara approaching the Falls?

THE LAW OF LOCAL TAXATION.



THE LAW OF LOCAL TAXATION.

CHAPTER 1.

RESTRAINTS IMPLIED FROM THE NATURE OF FREE GOVERNMENT.

On the subject of local taxation, or assessments for local public improvements, we have varied statutes in every state, varied and contradictory, and inconsistent decisions thereon. The Bill of Rights in our state constitutions is substantially the same. We here consider local taxation with reference to only one provision of our Bill of Rights and that is:

“Private property shall not be taken or applied to public use without just compensation” (with the additions made to it in the Missouri Constitution of 1875).

I shall not call the subject-matter “*eminent domain*,” or “*a condemnation proceeding*” for that would in the writer’s opinion narrow the meaning intended by the framers of the Constitution. The framers of the Constitution evidently intended to prohibit a thing and not a name only. I omit the other (perhaps broader) provision, “No person shall be deprived of life, liberty or property without due process of law.” No substantial verbal change has been made in the first provision and our reasons or suggestions will be confined mainly, almost entirely, to that provision. The language of the other provision has been changed. It was formerly thus:

“Nor shall the *accused* be deprived of life, liberty or property without due process of law,” seemingly aimed at prosecutions for crime, and seeming to indi-

cate that if the person was not the accused he was not entitled to life, liberty or property. Hence, seemingly an honest man was not entitled to life, liberty or property, especially if we apply the maxim, "*Expressio unius, exclusio alterius*." In many of the decisions, the constitutional validity of various statutes is discussed without clearly and distinctly "putting the finger" on the particular provision of the Constitution with which the statute may be said to be in conflict, and without showing clearly and distinctly how or why there is a conflict. In some cases statutes are alleged to be in contravention of one section or clause of the Constitution, or Bill of Rights, and the decision is that the statute is not in conflict with that clause of the Constitution or Bill of Rights. When the same statute is alleged to be in conflict with some other section or clause of the Constitution or Bill of Rights, then the former decision is held binding and conclusive although the point was not raised or discussed by court or counsel. It seems in many cases to be considered that if the constitutional validity of a statute is called in question on one ground, and it is decided that the statute is valid on that ground and as against such objection, then the decision is construed as settling its constitutionality on all possible grounds. In this way these wholesome provisions of our Bill of Rights have been narrowed by judicial decision until now it may be fairly said that in local taxation the legislative power is not governed by the Constitution or the Bill of Rights.

In *Wells v. Weston*, 22 Mo. 384 (decided in 1856, under tax levied in 1851), an act of the state Legislature purported to authorize the city authorities of Weston to levy a tax of one-half of one per cent on all the real estate without the corporate limits of the city and within one half mile of such limits. The state Constitution of Missouri then provided that all property subject to taxation should be taxed in proportion to its

value. That Constitution did not confer the power of taxation on the Legislature in direct terms. It did not in terms then restrict taxation otherwise than by providing that all property subject to taxation should be taxed in proportion to its value. The Bill of Rights of that Constitution provided that private property should not be taken or applied to public use without just compensation.

A tax of one-half of one per cent was levied on the lands of Mr. Wells lying outside of the city limits, but within one-half mile of such limits. The lands were advertised for sale regularly according to statutes and ordinances. Mr. Wells applied for and obtained a temporary injunction restraining the sale on the ground of the constitutional invalidity of the tax and that the sale would cast a cloud on the title to his land. The constitutional invalidity of the statute arose on a *demurrer to the petition*. *The demurrer to the petition was sustained in the court below, but the judgment was reversed above.*

Judge Leonard in rendering the opinion of the court said:

“The question that has been argued before us upon this record, and the only one that we have considered is, whether it is competent for the Legislature to confer upon the city of Weston authority to tax, for local purposes land, lying beyond the corporate limits. We have considered the matter with all the care that it is our duty to do, when we are required to decide upon the constitutional validity of a legislative act, but clearly of opinion that this provision of the charter violates the constitutional rights of the citizen, which we are to protect, we are constrained to pronounce accordingly. The judgment upon the demurrer will therefore be reversed and the cause remanded.

“It is true the Legislature possesses the uncontrolled power of taxation, with the single limitation

that 'All property subject to taxation shall be taxed in proportion to its value,' and this authority to tax, they may undoubtedly delegate to subordinate agencies, such as county tribunals and municipal corporations, to be assessed and applied locally; but here the attempt is to authorize a municipal corporation—charged with the subordinate government of persons and things within its limits, and having, as incident to this, the power to tax these persons and things for local purposes—to impose a tax upon the lands lying beyond its limits; or, in other words, arbitrarily, under the mask of a tax, *to take annually from those who are without its jurisdiction a certain portion of their property lying within a half mile of the corporate limits; which we think can not be done.*"

The tax was here one-half of one per cent. There was here no infringement of the rule of constitutional law requiring all property subject to taxation to be taxed in proportion to its value. The charter is unconstitutional. Why? Some other provision of the Constitution has been infringed. Notwithstanding Wells' land was taxed 'in proportion to its value,' in precise accordance with this constitutional provision still *this provision of the charter violates the constitutional rights of the citizen.*

"As the very purpose of instituting government is the protection of the citizen in his person and property, power to violate these rights would seem to be quite beyond the lawful authority of any government; and certainly the legislative department of this government cannot arbitrarily take the property of one citizen and give it to another, and, of course can not authorize others to do so. This is not within the power of any properly constituted government, and our American governments are expressly prohibited from taking private property, even for public use, without just compensation to the owner. To justify even such an invasion of

private property, it must be shown that the use for which it is about to be taken is a public one, and that the compensation to be given has been sufficiently secured to the party; and certainly from the very purpose of all just governments, and this express provision we may safely imply a constitutional prohibition against the arbitrary taking of private property for private use without any compensation. This, however, seems to be substantially the authority here given: *those who live in the town are authorized to exact annually from those who live adjacent to it, a certain portion of their property, to be applied, under their direction, to their own local purposes.* And this we think can not be done under our government, which was instituted exclusively for the protection of individual rights, and where private property is expressly protected from any appropriation of it, even to public use, without full compensation to the owner." And now by express constitutional provision in all the States, with few exceptions, private property can neither be taken nor damaged for public use without "just compensation" paid in advance. The citizen is not now required or obliged to enter into an unequal contest against a powerful adversary being either the State or some corporation having all the powers of the state government.

This municipal tax law is judicially determined to be an authority "To take annually from those who are without its jurisdiction a certain portion of their property lying within a half mile of the corporate limits, which we think can not be done."

The reader will note the difference between taxation by the State on the one hand and taxation by a city, town, village or county or other corporation exercising a delegated authority, on the other hand. The state legislature can tax in all cases not prohibited by the Constitution of the State or the Constitution or

laws of the United States; the county, city, town, village or other municipal corporations can tax only in the cases authorized. When the State taxes, the question is, "Is the authority to tax *prohibited*?" When the county, city, town, village, or other municipal authority taxes, the question is "Is the authority *given*?"

In this case the court recognized the validity of a delegation (to the city of Weston) of this taxing power notwithstanding the general rule of constitutional law that legislative power can not be delegated. "No instance it is believed, can be found where these corporations have been clothed with power to tax others not within their local jurisdiction for their own local purposes and if the Legislature possess the power now claimed, over private property, they ought to exercise it themselves and not delegate it to those whose interest it is to abuse it."

This Weston tax law *takes the property of one man and gives it to another*. While this delegated power in the Weston charter is invalid as a delegated authority to take the property of one man and give it to another I do not understand the case to hold that the Legislature of the State may take the property of one man and give it to another. The Weston taxation law took private property of Mr. Wells and vested it in a number of citizens. If that act of taxation had been done directly by the State it would still have been a taking of the citizen's private property for private use.

The taxing ordinance of Weston and the sale thereunder threatened and enjoined will cast a cloud on Mr. Wells' title to his land. The threatened sale would be invalid because the ordinance is invalid; the ordinance is in form authorized by the town charter of Weston and if the authority to tax is valid the sale and deed will convey his title to the land, i. e., it takes Mr. Wells' land and gives it to the people of Weston. A direct enactment by the Legislature would be no better. The

authority is to take private property for private use. The Legislature can not do this directly. It can not authorize Weston to do so. Hence this charter of Weston is on this point invalid; it contravenes a provision (implied) of the Constitution that private property shall not be taken from one man and given to another for private use. This decision was rendered in 1856. While under this tax law Mr. Wells' land could have been taken and sold and the title passed to others but for the injunction, yet this is not a condemnation proceeding. It was not proposed to condemn Mr. Wells' land to public use. It is in no sense an exercise of the right of "eminent domain." The taxing was a taking to the extent of the tax. If the Legislature may tax one-half of one per cent it may tax one hundred per cent in the absence of some constitutional limitation as to rates. This taxation law would have been void if we had never adopted the constitutional provision that "All property subject to taxation shall be taxed in proportion to its value."

The *City of St. Charles v. Nolle*, 51 Mo. 122, decided at October term, 1872, is a case of taking personal property under the guise of taxation.

The city of St. Charles, Missouri, had power by her charter to tax wagons used to carry property from places without to places within the city, and from places within the city to other places within the city. The ordinance deemed proper to carry out this power was passed. Fritz Nolle, not a resident of the city of St. Charles, but living on a farm five miles from the city, was employed by a lumber firm in the city of St. Charles to haul lumber for the firm from the river landing seven miles below St. Charles to the firm's lumber yard in St. Charles. Mr. Nolle had no license and he was prosecuted for violation of the city ordinance. The court in rendering the opinion (51 Mo. 122, loc. cit. 124) say:

"Besides, if the Legislature had given the power

in so many words, in my judgment, such legislation would have been void as going beyond the limitation of legislative power. Although there may not be any express limitation on legislative power in our state Constitution, in many instances the very nature of our state governments and the purposes for which they were created, must form a barrier to legislation which deprives one portion of the community of its property for the benefit of others.

“The proper construction of the Constitution in regard to taxing [evidently a misprint for “taking”] private property for public use, is that it can be taken only for public use and not for private use at all, and when taken for the public use there must be a just compensation allowed and paid. *To tax occupations outside of the city, for the benefit of those living in the city is in effect taking the property of the citizens for private use: that is, for the use of a particular community, of which the outside citizens form no part. Whether it be called a tax or the appropriation of property, the result is precisely the same.*”

Here again the offending power is the tax power. “All property subject to taxation shall be taxed in proportion to its value,” is the only limitation in express terms on the taxing power, *eo nomine*. But this license tax ordinance and the charter authorizing it, take private property for private use against a prohibition in the state Constitution, implied from the very nature of the Constitution, and even if it had taken it for public use it would have been invalid as taking private property for public use without just compensation. The property here taken was the money value of the license.

In the *Town of Cameron v. Stephenson*, 69 Mo. 371, *Wells v. Weston* and *St. Charles v. Nolle*, were referred to and approved. Stephenson held a deed to lot 78 in the town of Cameron. He paid city taxes for five years. He had voted as a citizen for \$50,000 railroad

bonds and now proposed to repudiate the tax. He claimed (and it was a fact) that his land was not in the town. The tax was invalid, as being without authority. The statute and ordinance violated this implied prohibition in the Constitution against taking private property for private use. Here again the offending power is the tax power.

In all these cases property was taken, or about to be taken. Wells' land was about to be taken; Fritz Nolle's money was about to be taken; Stephenson's town lots were about to be taken. In all these cases the law was literally complied with as to taxation according to value.

Speaking of limitations of the powers of government not in a written constitution, the St. Louis Court of Appeals, in May, 1882, in the case of *The State of Missouri v. Addington*, 12 Mo. App. 214, at 221 (top) says through Seymour D. Thompson, Judge, rendering the opinion:

"On the other hand there is no such thing, in a free country, as absolute, unrestrained power in any branch of the government; and while there are frequent expressions to the effect that a statute will never be declared void unless the objector can put his finger upon some specific provision of the Constitution which has been transcended, yet we are disposed to concede that there is in this country, such a thing as an unwritten constitution; that there are implied reservations of private right in every free government of such an absolute character that laws infringing them will not be enforced by the judicial courts." *Loan Association v. Topeka*, 20 Wall. 665, is referred to.

State v. Addington, quoted from above, did not directly involve the tax power. *Loan Association v. Topeka*, above, is a writ of error to the United States Circuit Court of Kansas from the Supreme Court of the United States. The decision construed the Constitu-

tion of the State of Kansas, not that of the United States. Hence this decision does not have the binding force of a decision of the State Supreme Court construing its own Constitution not charged to be repugnant to any portion of the United States Constitution. But it is a suit on municipal bonds. The validity of the bonds depended on the power to tax persons and property. The bonds were to encourage manufacturing in Topeka under a special act of the Kansas Legislature. That the suit was brought on these bonds in the circuit court of the United States and not in the state court *was a matter to be expected*, although it is to be regretted that the Supreme Court of Kansas was not required to pass on her own Constitution. Mr. Justice Clifford alone dissented.

Mr. Justice Miller rendered the opinion of the court. He states that there were two reasons urged against the constitutional validity of the act of the Kansas Legislature. The first ground or reason urged against the constitutional validity of the act of the Kansas Legislature is founded on the language of section 5 of article 12 of the Constitution of the State of Kansas, whereby it is provided that, "Provision shall be made by general law for the organization of cities, towns, and villages; and their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, shall be so restricted as to prevent the abuse of such power." (20 Wall. at 658.) No restrictions were made and consequently the act was void. The court remit this question to the courts of Kansas and place their decision on the second ground or proposition. That proposition (p. 659) is "that the act authorizes the towns and other municipalities to which it applies, by issuing bonds or loaning their credit, *to take the property of the citizen under the guise of taxation to pay these bonds, and use it in aid of the enterprises of others which are not of a public charac-*

ter, thus perverting the right of taxation, which can only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain. The proposition thus broadly stated is not new, nor is the question, which it raises difficult of solution."

After observing that in general if a municipal corporation contract a debt, it must be paid by general taxation, and if the corporation can not tax for the purpose it can not make the contract, the court further say (p. 662):

"We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power of the state Legislature to tax the people, but conceded that where the purpose for which the tax was to be issued could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects the law authorizing it was beyond the legislative power, and was an unauthorized invasion of private right. It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than many.

"The theory of our governments, state and national, is opposed to the deposit of unlimited power any-

where. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

“There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or, which should enact that the homestead now owned by A should no longer be his but should henceforth be the property of B. . . .

“This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

“To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. It is a decree under legislative forms.”

After defining what is a tax and declaring that the purpose must be public, and after quoting from *Northern Liberties v. St. John's Church*, 13 Penn. 104, et seq. (quoted in our own Supreme Court and elsewhere referred to in this book), and after citing other authorities, the court continuing says:

“But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been

considering. If it be said that a benefit results to the local public of a town by establishing manufactories, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."

The court refer to a number of cases of similar import, among them *Allen v. Inhabitants of Joy*, 60 Me. 124, where town bonds were voted to Messrs. Hutchinson and Lane to build in the town a steam sawmill, gristmill and box factory machinery; and the \$20,000,000 in bonds to aid private property-owners in rebuilding their houses after the great Boston fire in 1872, and another to aid a school established under a will not under the ownership or control of public. [*Allen v. Inhabitants of Joy*, 60 Maine 127; *Lowell v. Boston*, referred to in 20 Wall. 660, note at bottom of page, as then in MS.]

Cole v. LaGrange, 113 U. S. 1, is a suit on bonds issued by the town of LaGrange in Missouri to encourage the manufacture (in the town) of steel and its product. Bonds were issued December 14, 1871, decided in Washington January 5, 1885. Mr. Justice Gray in rendering the opinion says:

"The general grant of legislative power in the constitution of a state, does not enable the Legislature, in the exercise either of the right of eminent domain or of the right of taxation, to take private property, without the owner's consent, for any but a public object. Nor can the Legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes. It can not, therefore, authorize them to issue bonds to assist merchants or manufacturers,

whether natural persons or corporations, in their private business. These limits of the legislative power are now too firmly established by judicial decision to require extended argument upon the subject."

In *Fletcher v. Peck*, 6 Cranch 87, at 135-6, Chief Justice Marshall says:

"It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation. To the Legislature all legislative power is granted; but the question whether, *the act of transferring the property of an individual to the public, be in the nature of legislative power. is well worthy of serious reflection.*"

"Indeed, in a free government almost all other rights would become utterly worthless if the government possessed an uncontrollable power over the private fortune of every citizen. One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, when all property is subject to the will or caprice of the Legislature and the rulers." [Story on Constitution of the United States, sec. 1790.]

Shall we say that the government does not have an uncontrollable power over the private fortunes of any citizen except by taxation? Shall we say that all the powers of a government are limited by implication except the implied power to tax? If the power to tax be unlimited, of what avail are other limitations? "Taxes may be levied and collected for public purposes only," was not in the Constitution of Missouri till adopted in 1875, in sec. 3, art. 10, of that Constitution. Certain municipal bonds are invalid because, to pay the bonds, taxes must be levied and collected and taxes can be lev-

ied and collected for a public purpose only. *Here is a limitation on the taxing power.*

In *Wells v. Weston*, *St. Charles v. Nolle*, *Cameron v. Stephenson*, *State v. Addington*, *Loan Association v. Topeka*, *Cole v. LaGrange*, *Fletcher v. Peck*, *Allen v. Inhabitants of Joy*, and in case of the bonds to aid those who suffered by the Boston fire, there was no condemnation proceeding—no exercise of the right of eminent domain. In all these cases there was no power to tax notwithstanding the evident benefit derived from the tax, in *Wells v. Weston*, *Loan Association v. Topeka*, *St. Charles v. Nolle*, *Stephenson v. Cameron* and *Cole v. LaGrange*. But if the property in any of the cases had been damaged and the tax had been by the front foot, it would now doubtless be held valid.

The people of Weston built up a large town. They brought as it were a convenient market almost to the very doors of those living within one-half mile of the city limits, yet Mr. Wells and others living within this half-mile limit could not be taxed on that account on *the benefited land*. There was no tax except upon the land. Mr. Wells was not required to pay \$300 in the form of a tax-bill for doing \$2,750 damage to his land. The railroad built into Cameron did not damage Mr. Stephenson's lot \$2,750 nor was he required to pay \$300 in addition as the cost of doing this damage, making the real loss \$3,050. The establishment of the factories would have benefited Topeka and La Grange. The damage would not have been ten times the cost of the factories.

“It may be often difficult to draw the line between a legitimate exercise of the taxing power and the arbitrary seizure of the property of an individual, or of a class of individuals, for local or general purposes, under the mask of this power. In *Chaony v. Hoover* (9 Ben Monroe 330) the question was as to the constitutionality of a law extending the limits of the town of

Hopkinsville, for the mere purpose, as the party alleged, of bringing his property within the corporation as a subject of taxation; and the judge who delivered the opinion of the court remarked:

“This is not a case of vacant land or of a well-improved farm occupied by the owner and his family for agricultural purposes and which, without being required for either streets or houses or for any other purpose of the town but that of increasing its revenue, is brought within its taxing power by an act extending its limits. Such an act, though on its face simply extending the limits of a town, and presumptively a legitimate exercise of power for that purpose, would in reality when applied to the facts, be nothing more or less than authority to the town to tax the land to a certain distance outside of its limits and in effect to take the money of the proprietor for its own use, without compensation to him”

The reader will notice that this is an exercise of the tax power by which money is taken without compensation. The court continuing say (22 Mo. 390):

“That limit can only consist in the discrimination to be made between what may with reasonable plausibility be called a tax, and for which it may be assumed that the objects of taxation are regarded by the Legislature as forming a just compensation, and that which is palpably not a tax, but is under the form of a tax, or in some other form, the taking of private property for the use of others or of the public, without compensation and in which it is apparent that the burthen is imposed without any view to the interest of the individual in the objects to be accomplished by it. If it be so, no matter under what form the power is professedly exercised, whether it is in the form of laying or authorizing a tax, or in the regulation of local divisions, or boundaries which result in a subjection to local taxes; and whether the operation be to appropriate the prop-

erty of one or more individuals without their consent, to the use of the general or local public, or to the use of other private individuals, or a single individual, the case must be regarded as coming within the prohibition contained in this clause, or the Constitution is impotent for the protection of individual rights of property from any aggression, however flagrant, which may be made upon them, provided it be done under color of some recognized power."

In 1853, in *Sharpless v. Mayor of Philadelphia* (21 Pa. St. 147) the Supreme Court of Pennsylvania say, per Black, Judge, rendering the opinion:

"It is said that this is a taking of private property for private use. If this be so it is palpably unconstitutional. Perhaps there is nothing in the books which shows the tenacity with which this court has adhered to the letter of the Constitution in determining the extent of legislative power more plainly than the doubt which was once entertained in *Harvey v. Thomas*, 10 Watts 63, whether the want of an express inhibition did not permit the Assembly to take one man's property and give it to another. The Constitution does prohibit it. *It is not within the general grant of legislative power.* It would be a gross usurpation of judicial authority and would violate the very words of section 2, art. 9 [This must be an erroneous citation, a misprint—Ess.]. The Legislature could not make such a rescript (for it would not be a law) any more than they could order an innocent man to be put to death without trial."

The legislative acts did not take private property for public use in that case.

In these tax cases, "Private property is taken."

CHAPTER 2.

LOCAL TAXATION IN CONNECTION WITH THE EXERCISE OF THE POWER OF EMINENT DOMAIN.

The mischievous effects resulting from the overthrow of constitutional laws in reference to taxation first appear in connection with the exercise of what is usually called the power of eminent domain. Here is the origin of the citizens' troubles — troubles which well nigh render the holding of property impossible because of the excessive burdens imposed upon it. Look at its history in the courts. *Meacham v. The Fitchburg Railroad Company*, 4 Cush. 291, is erroneously cited in *Newby v. Platte County*, 25 Mo. 258, loc. cit. 276. (Citation of page 392 is erroneous.) In this case Meacham was the owner of several tracts of land in the town of Watertown, Massachusetts. Commissioners were appointed to assess damages to Mr. Meacham for his land to be taken for a railroad. He owned several other tracts of land in Watertown. The commissioners made their report and Mr. Meacham being dissatisfied with it filed in the common pleas court his petition to revise the damages awarded to him. The case was tried before a jury. The railroad company was respondent or "respondents" (in the plural). In the course of the trial the railroad company "proved that the petitioner (Meacham) at the time of the laying of the railroad, and ever since, was the owner of certain other lands and buildings in Watertown, near but not adjoining the lands described in the petition; they then offered evidence for the purpose of showing that since the laying out and construction of the railroad and in consequence thereof, the lands and buildings of the pe-

tioner, other than the lands described in the petition, and separate therefrom, as aforesaid, had increased in value to the petitioner. But the evidence so offered being objected to, the presiding officer decided that it was inadmissible; and to this decision the respondents (the railroad company) excepted. After all the evidence was in, the presiding officer instructed the jury, "that if they were satisfied the laying out and construction of the respondent's railroad had created or occasioned any benefit or advantage to the lands of the petitioner, described in his petition or immediately adjoining or connected therewith, rendering the part not actually occupied by respondent more convenient or useful to the petitioner, or giving it some peculiar increase of value in the vicinity, it would be their duty to allow for such benefits or increase of value by way of set-off in favor of the respondents; but that, on the other hand, if the construction of the respondent's railroad, by increasing the convenience of Watertown generally as a place of residence, and by its anticipated and probable effect or influence in increasing the population, business and general prosperity of the place had been the occasion of an increase in the saleable value of real estate generally near their depot, including the petitioner's said lands, and thereby occasioning a benefit or advantage to him in common with other real estate owners in the vicinity this benefit would be too contingent, indirect and remote, to be brought into consideration in this question of damages to a particular parcel of land." To these instructions the railroad excepted.

After remarking on the general character of the statutes allowing general benefits to the owners of the lands, the court say:

"The Revised Statutes, chapter 24, section 31, in like manner, provide generally for an allowance by way of reduction for such advancement in value of other property. That there must be some limitation of the

proposition that the respondents may show in reduction of damages any collateral benefit which the petitioner has received in his other property, seems quite obvious. The party whose land has been taken for a railroad, has a right, in common with his other fellow citizens, to the benefit arising from the general rise of property in the vicinity, occasioned by the establishment of the railroad and the facilities connected therewith." If he has such right then the railroad company cannot compel him either to pay cash for such benefit or what is the same thing. The railroad company can not tax it or deduct it from his compensation in the condemnation proceeding. This opinion is followed in *Newby v. Platte County*, 25 Mo. 258. The Massachusetts statute provided "Generally for an allowance by way of deduction for such advancement in the value of other property." The Missouri statute provided that the commissioners "Shall take into consideration the advantages as well as the disadvantages of the road to such person."

This Missouri statute did not nor did the Massachusetts statute in terms restrict these advantages or benefits to such as were peculiar, special and exceptional to the part left not enjoyed in common with other landowners in the vicinity.

The statute of Missouri and that of Massachusetts would both have been adjudged unconstitutional if either had allowed general advantages to be deducted from his "just compensation." The constitutional provision infringed was, "Private property shall not be taken for public use without just compensation."

There is no pretense of any infraction of the rule of constitutional law that "All property subject to taxation shall be taxed in proportion to its value." A statute can not be enacted to diminish "the just compensation" required by the Constitution to be paid to the

owner for land taken for public use if such diminution rests on the ground that there is in fact only a general benefit to the owner of the land. There must be not only a benefit to the land from which a part was taken; that benefit must be special, peculiar, not enjoyed by the owner in common with other land in the vicinity. The exaction of this general benefit can not be made from this "just compensation" allowed, nor from the owner personally, nor as a charge on other land or property of the owner. The power that diminishes this "just compensation" by reason of benefits to other lands is the tax power. In the road law of the District of Columbia (27 U. S. Statutes at Large, p. 535, sec. 2) similar language is used and construed in like manner by the Supreme Court of the United States in *Bauman v. Ross*, 167 U. S. 554, at 577.

"It would operate with great inequality to hold that where there are various individuals, each owning large manufacturing or trading establishments in the immediate vicinity of a railroad, but without being adjoining to or connected with the located limits of such railroad, one of whom is the owner of a parcel of land situated in another part of the town over which the railroad is actually located, that as to the latter, he is by way of reduction of damages for his land thus taken, to be charged for all the incidental benefits which he receives from the location of the railroad in the vicinity of his other land, while the land of others is exempt from any contribution. . . . The great and leading principle, to authorize such reduction of damages, is the direct benefit, or increase of value to the remaining tract or parcel of land, by reason of the railroad passing through the lot or tract as to which damages are assessed." [S. C., 4 Cush. 292.]

The exaction can not be made by deducting general benefits from this "just compensation," or by ex-

action of the amount from the owner personally or as a charge or lien on other lands or property. This exaction can not be made under the power of eminent domain, or the police power, or the power of taxation general or special.

In *McQuiddy v. Smith*, 67 Mo. App. 205, et seq., Mrs. Smith's lot by the grading was damaged \$2,750 according to the decision by court and jury. Under the old Constitution of Missouri this damage was not a taking, and hence, "*damnum absque injuria*," but would the court have put a special tax or sustained a special tax on this damaged lot to pay this presumptive benefit (in fact a damage of \$2,750)?

The case of *James River and Kanawha Company v. Turner*, 9 Leigh's Reports 313, loc. cit. 334, is well reasoned on principle. The reporter's headnote is thus:

"And it seems that if the charter had provided that advantages of a general character, which the owner of the land condemned may derive from the improvement in common with the country at large, should be set off against the actual value of the land condemned and actual damages sustained by the owner, such provision would have been unconstitutional." The opinion of the court "Puts the finger on the provision of the Constitution" violated, viz., the Constitution of Virginia, art. 3, sec. 2 which has provided, that the Legislature shall pass no law "Whereby private property shall be taken for public uses, without just compensation."

Says Judge Brockenbrough in rendering the opinion:

"It could not have been intended to authorize the company to seize on and sequester the property of an individual, and under pretext of making him a compensation for that property, to claim a set-off for a general advantage, which will deprive him of the just compensation intended by the Constitution. It is not credible,

in my opinion, that the Legislature intended to compensate the riparian proprietor for the land taken for public uses, by the value of the real or supposed advantages derived from the improved navigation, when those same advantages were conferred freely on all others, without being looked upon as a compensation.

. . . But even if there were no tolls, or if the tolls were surrendered, and the navigation thrown open to the public, still I should think, that the riparian proprietor could not be required to pay for the general advantages resulting from the improvement. His land is taken from him without his consent, and for that he is entitled to just compensation. The advantage which he obtains from the improved navigation is not of his own seeking; he obtains it from the public legislation, pursuing the public policy of the country. Obtaining it fairly in that way, why should he be deprived of it? Why should he pay for an advantage which is in some sort forced upon him by the public, and which it confers on him not with the particular view of benefiting him, but for its own wise purpose."

Presiding Judge Tucker, after stating the question at issue as being whether general advantages can be deducted or charged as part of the just compensation required by the Constitution, says:

"It is obvious as has been observed by my Brother Parker, in the able opinion just delivered, that in a vast majority of cases, the value of the land condemned for a public improvement will bear a very small proportion to the enhancement in value of the remainder of the tract; I mean an enhancement not arising from advantages peculiar to that tract, but extending to the whole community upon its line, and arising out of the salutary influence of improved facilities of transportation, upon the value of all the real estate within the circle of that influence. If, therefore, in a vast major-

ity of the cases, the value of the condemned land will be exceeded by the enhancement of the residue, and if that enhancement is to constitute the compensation, then it is obvious, that in a vast majority of cases the Constitution will have nothing to operate upon; and this great and important principle will be confined to the few solitary cases (if indeed any case shall ever occur) in which the proprietor of the condemned property does not derive from the public work advantages of a general character, equivalent to the value of what is taken from him.

“Moreover, it is obvious under this construction of the instrument, that its principle may be extended to a variety of other cases, so as to render this boasted provision of little or no value. Thus, it may be provided, that if an acre of one man’s land is essential to the abutment of his neighbor’s milldam, it shall be condemned without compensation for its value, provided a jury shall believe the conveniences of the mill to the owner will more than equal the value of the portion of the land taken from him. And so with respect to public roads and landings. So, too, if a courthouse is to be erected upon one’s land, two acres may be condemned without the allowance of a cent, because the adjoining property is rendered more valuable for the establishment of inns, storehouses, and other like advantages. If such be the meaning of this clause of the Constitution, ‘it keeps the word of promise to the ear, but breaks it to the hope.’ It is a mockery, instead of a wise, just and salutary safeguard of the rights of the people. *The jus publicum*, though an absolutely essential attribute of sovereignty, should be exercised by every wise and paternal government, with just respect to the rights of individuals. It is enough that it deprives the citizen of his property without his consent; it is enough that it deprives him of that monopoly, which might enable him

to exact exorbitant terms for his property; it is enough that it takes from him the privilege of bargaining for himself, and appoints others to bargain for him. It therefore makes compensation for what it takes; it does not put a charge upon him which others do not bear; it aims to place the public burdens equally upon all, by paying the proprietor for that which is taken from him. This is the very object of the Constitution. But this object is utterly frustrated if private property is sunk, and its value extinguished, by setting off a part of those incidental advantages to which the owner is entitled in common with all others within the sphere of the improvement. He is not only deprived of the right of making the most of his monopoly, but his possession of property essential to the canal, which, according to the ordinary view of things, would give him great advantages, is actually converted to his loss. He is in a far worse condition than his neighbor who has *not* his advantages; for the neighbor enjoys all the benefits of the canal, and loses none of *his* land, while the owner pays, in the price of his land, for those advantages which others get for nothing. What benefit does the Constitution, in this view, confer on the owner of land condemned? What protection does it afford for his rights? His situation is just the same as if the provision of the Constitution had never been made.

Without it, he would have enjoyed all the advantages of the canal, and have lost none of his land; and under its protection, what more does he get? Absolutely nothing. For while he enjoys the benefit of the public improvement, in common with his fellow citizens, he receives not a cent for the property taken from him.

“The whole argument, in truth, appears to me to be founded in a want of due attention to the true meaning of the terms of the Constitution. ‘Compensation’ means ‘A recompense given for a thing received.’ But

the general advantages received by the public from a public improvement, cannot properly be said to be a 'Recompense given' for the land, for they are equally conferred on those who lose *no* land. Neither, indeed, are they *gifts* to anybody. They are a mere incident, or accident, arising out of the existence of the improvement. They are like the benefit conferred on me by my neighbor, when he builds a merchant mill convenient to my barn. I am benefited, indeed, but that benefit, though conferred by him, gives him no claim against me. In the adventure he has proceeded with a view to his own profit, not with a view to mine. The benefit I enjoy I do not owe to his liberality. It is neither a gift *ex mero motu*, nor can it be tortured into a price given for what he has taken from me. It can create no debt; it can pay no debt. It can neither give a right of action for benefits conferred nor can it give a right of set-off for damages done or property condemned. If it could give such right of set-off it is not perceived why it should not give a right of action for the excess of the benefit over and above the value of the property taken. Nor can I imagine how the company is to compensate the defendant for her \$350 worth of land by setting off a claim for benefits conferred, which they never could enforce by suit, and for which they can have no pretense of claim legal or equitable."

I have thus quoted freely and fully from these cases on the ground that the legal and practical reasons advanced appear to be sound and well founded and in the opinion of the writer commend themselves to the sense of justice, honor and fair-dealing of every one.

A. and B. each owns twenty acres of land. Ten acres of A.'s land is taken for railroad tracks, depot and switches. The land of each is worth \$20 per acre before the advent of the railroad. By the advent of the railroad all lands are doubled in value. A.'s twenty

acres was worth \$400. His remaining ten acres is worth \$400. He had \$400 worth of land before the advent of the railroad. He has \$400 worth of land after it was built. On the contrary, B. had \$400 worth of land before the advent of the road and \$800 worth of land after the road was built. A. contributed ten acres of his land to double the price of B.'s land. The depot doubled the price of B.'s land but B. did not pay anything for it. The ten acres might have been devoted to the construction of elegant residences and thereby B.'s land might have been doubled in value but no law can be enacted under our present state constitutions that will compel B. to pay any portion of the value added to his land by his residences constructed, however elegant they may be. The intrinsic value of the land is not changed; the fertility of the soil is not increased. The atmosphere (physical and moral) is not changed for the better. We are drifting in modern commercialism. Everything and everybody is for sale. The dollar-mark is put on everything, fewer on the souls of men than on other articles of commerce on the well-known principle of American constitutional law, "*De minimis non curat lex.*"

The Supreme Court of Missouri, in *Newby v. Platte County*, follow *Meacham v. Fitzhugh Ry. Co.*, and in *Garrett v. St. Louis* refer to *James River and Kanawha Co. v. Turner*, and approve the opinions of Judges Tucker and Brockenbrough, quoted *supra*.

A fuller statement is demanded of the case of *Garrett v. St. Louis*, 25 Mo. 505 (A. D. 1857). Say the court at page 512:

"But the Constitution intends to place the public burdens upon all and to do this pays the proprietor of land for what is taken by the public. *If he is paid in advantages which the community at large whose land is not taken enjoy equally with himself, the spirit of the provision might be said to be violated.* His loss is cer-

tain and specific and in relation to the land which is not taken he only receives the same benefit which others receive who have sustained no loss. These views are very forcibly presented by Judges Tucker and Brockenbrough in the case of *James River and Kanawha Company v. Turner*, 9 Leigh 313."

Garrett v. St. Louis, 25 Mo. 506-7, was tried on an agreed statement of facts. Mr. Garrett had improved his lot. The buildings were valued by the jury at \$1,440, and the land taken was worth \$768.45, making land and buildings worth \$2,208.45. A part of Mr. Garrett's land was left. What the land left was worth before the taking or after is not stated. The land taken was worth \$768.45. The land not taken was benefited \$763, which amount was a lien on the land not taken. The value of the land taken is \$5.45 more than the benefits to the land not taken. Say the court, page 508:

"The only question in this case is the constitutionality of the second section of the amended charter of St. Louis, passed February 23, 1853. This section, among other provisions, authorizes the city council to open streets; and when for this purpose it becomes necessary to take private property, it provides the following mode of ascertaining the compensation: After notice to the owner, the mayor is directed to impanel a jury, whose duty it is made to ascertain the actual value of the land proposed to be taken, without reference to the proposed improvement. To pay the sum thus ascertained the city is taxed in an amount equal to the value of the improvement to the public generally, and the remainder is assessed against the property fronting on such street, and in the blocks next adjacent, on either side or end thereof, *according to the value of the property so assessed, and in the proportion that the owners thereof may be respectively benefited by*

the improvements.' Where under this provision, the entire lot is taken for the street, it is plain that nothing more has been done than an exercise of the right of eminent domain and in a mode in strict conformity to the Constitution. The owner of the lot taken has no cause for dissatisfaction, since he is paid the full actual value of his lot; and the means adopted by the city to raise the funds for this payment are a matter of indifference to him. But where the entire lot is not taken or where the owner has other land on the same street, the question arises whether he can be compensated in the mode provided by the charter."

"That this assessment upon the lotowners fronting upon the street is an exercise of the taxing power seems too plain to admit of argument."

Again, at page 514, speaking of the case of *The People v. Mayor of Brooklyn*, 6 Barb. 213, where the power exercised was held to be that of eminent domain; the court say:

"That decision was reviewed and overruled by the court of errors (S. C., 4 Comstock 420); which circumstance is calculated to destroy its authority in that State, but would not and ought not to impair its value here, if the reasonings and conclusions of the court were such as to command the assent of our judgment. *But that in my judgment is not so: neither the arguments nor conclusions are satisfactory.* The court declare the power exercised by the Legislature to be that of eminent domain and this is true where any portion of a lot is taken for the improvement, but is plainly not true when the assessment is upon those whose lots are not touched. When such persons are assessed it can only be under the taxing power, since the power of eminent domain operates only upon individuals and 'without reference to the amount or value exacted from any other individual or class of individuals;' but taxa-

tion 'operates upon a community or upon a class of persons in a community, and by some rule of apportionment.' When therefore it is clear that this assessment upon one class of lot-holders is an exercise of the taxing power, there is no reason why it should not be held to be an exercise of the same power upon the other class whose lots are taken under the power of eminent domain and paid for according to their exact value."

Suppose Mr. John Smith owned this part of the land not taken (I mean the Garrett land) for the street; then the assessment will be upon Mr. Smith and the lot. Mr. Garrett is entitled to his "just compensation" for his house and lot taken for public use, fixed by court and jury at \$2,208.45. The sum of \$763 is upon Mr. Smith and his lot. Let execution issue against Mr. Smith and his lot and all his other property. The whole of Mr. Smith's property was sold realizing, say \$263, and the execution is returned "nulla bona." What is Mr. Garrett to do for the balance of his "just compensation." He is short \$500. This "just compensation" must be paid to Mr. Garrett before he can be compelled to give up his house and lot.

The Constitution intends evidently that Mr. Garrett shall have this "just compensation," \$2,208.45, paid to him. He can not be compelled to take taxes that may or may not be paid because the owner taxed is insolvent or the property taxed is of less value than the amount of the tax (as in *Zoeller v. Kellogg*, 4 Mo. App. 163, where the tax was \$1,688 on property worth \$1,025). It is utterly impossible to sustain this condemnation: there can not be raised money enough to pay Mr. Garrett.

When there is no condemnation—when it fails—by reason of failure to pay Mr. Garrett this \$2,208.45—whence is derived the power to tax Mr. Smith or his

lot? The power to tax Mr. Smith and his property is not given in the Constitution in express terms; a power to do so in that Constitution ought not to be implied. The framers of that Constitution never intended anything of that kind.

The St. Louis Charter provided that the jury after first ascertaining the "just compensation" to each tract taken "without reference to the proposed improvement," should proceed to ascertain the benefit to the public, and next the benefit to each lot and the owner. If the benefits are \$500 to the public and \$500 to lots and their owners, the condemnation must fail. Is there any authority for the tax? The question is a question of the power to tax. If St. Louis had the power to tax Mr. Smith and his lot and did so tax that lot and Mr. Smith, then Mr. Smith's lot has gone from him by sale of the lot and the city gets the money and he can not get the money. Besides, Mr. Smith wants his lot and not the money it sold for. Did the city have power to sell it? Did the city have power to tax it? The purchaser got Mr. Smith's lot and St. Louis got the money it sold for, being its full value, both under false pretenses. The purchaser would know that the \$1,000 tax could not pay Mr. Garrett \$2,208.45, and consequently the city could not get the street until Mr. Garrett was paid in full. The city could not nor could the purchaser compel Mr. Garrett to compromise at forty or fifty cents on the dollar. The city got this money and the purchaser got Mr. Smith's lot literally under false pretenses. The law never intended anything of that kind. But the power exercised is certainly the power of taxation so far as Mr. Smith is concerned, and the question is as to the existence of the power and not of the degree to which it may be exercised.

But it may be said that this tax is void under the tax law and not under the Constitution. Under the

statute there can not be a condemnation or tax. The Constitution authorized the condemnation: the statute did not. The Constitution authorized the tax or authorized the Legislature to enact that kind of tax law.

Now let us change the law. Here are the facts (say):

Mr. Smith's lot before the improvement was worth \$100. All the lots within one mile of the improvement are doubled in value and Mr. Smith's lot becomes worth \$200, and then Mr. Smith's lot receives a special, peculiar, exceptive benefit over and above all lots on the street. This exceptive benefit is (say) \$100. The general benefit, the original value of the lot and the special benefit make \$300. Add fifty per cent to the original value of the lot, the general benefit and the special benefit makes \$450 against Mr. Smith and his lot and the public benefit added (\$500) makes \$950.

How is Mr. Garrett to get his "just compensation" (\$2,208.45) out of this \$950? It is short \$1,258.45; so the statute will authorize an additional tax on Mr. Smith's lot, making the total tax on Mr. Smith and his lot \$1,708.45, and the city tax for five hundred for the city's benefit makes \$2,208.45. The statute in form authorizes this tax of \$1,708.45 on Mr. Smith and his lot, and if the statute has constitutional authority to support it, there is no way for Mr. Smith to evade that tax. So his lot must be sold. There is no way known to Mr. Garrett or Mr. Smith or to the Constitution or the law by which any one can compel a bidder to go to that sale and bid for that lot and pay \$1,708.45 for the lot. Some one bids \$200 being 100 per cent of the original value of the lot and 100 per cent of the benefit, the special peculiar benefit, and the sheriff makes a deed to the purchaser, and Mr. Garrett is short \$1,508.45 on his "just compensation" of \$2,208.45. So Mr. Garrett keeps his lot till this "just compensation" (\$2,208.45)

is paid to him or into court for him as owner. The purchaser got Smith's lot and the city got the money it sold for, both under false pretenses and both ought to go to the penitentiary for it.

It is true that it may not happen that \$200 will be the only bid: It may be true it is not likely to happen; it is true it may not happen that \$1,708.45 will not be bid for Mr. Smith's lot. It is true that it is not likely to happen. "It is true it is not likely to happen, but the fact that it may possibly happen is enough to condemn the law" (*City of St. Louis to use v. Allen*, 53 Mo. 44, l. c. 55, A. D. 1873).

There never was a power to take Mr. Garrett's land without first paying Mr. Garrett his "just compensation" (\$2,208.45).

It is said in *Newby v. Platte County*, 25 Mo. 258, at 264, that here is exercised both powers of government in *the same breath*: *first*, eminent domain, under which Mr. Garrett's land is taken and just compensation paid; *second*, taxation to pay Mr. Garrett. But if Mr. Garrett's compensation is not paid, all parties *get out of breath* before taxation is reached. Either Mr. Garrett must lose his land and get nothing for it or Mr. Smith must lose his land and get nothing for it. With Mr. Garrett the power exercised is named "eminent domain;" with Mr. Smith the power exercised is named "taxation."

In *Louisiana & Frankford Plank Road Company v. Pickett*, 25 Mo. 535, l. c. 537, the court below gave this instruction held to be erroneous and occasioning a reversal of the judgment: "The jury shall go upon the land over which the road is proposed to run, and shall assess the damages sustained by said Pickett, taking into consideration the advantages, if any which said road may be to said Pickett, and the jury shall make out in writing their verdict," etc. Say the court:

“The instruction given by the court was erroneous in not restricting the jury to such direct and peculiar benefits or increase of value as were occasioned to that part of Pickett’s land not taken for the road and directing them to discard from their consideration any general benefit or increase of value received by such land in common with other lands in the neighborhood. This has been determined to be the proper construction of this and similar statutes,” referring to *Newby v. Platte County*, 25 Mo. 258, and *Pacific Railroad v. Chrystal*, 25 Mo. 544. Judge Richardson dissents; Judge Scott occupies one extreme, Judge Richardson the opposite.

From the very terms of the Constitution the owner of property taken for public use must have just compensation. This constitutional provision is completely frustrated, annulled, obliterated if the “just compensation” may be taxed one hundred per cent, or if the owner may be personally taxed to the extent of one hundred per cent, or if his other property not benefited be taxed in an amount sufficient to pay this “just compensation.”

If the whole lot is taken its price or market value is his “just compensation.” This is the exercise of the eminent domain power. If part only is taken, then the remainder may be left in such form and condition as to be of less value. The additional fencing needed, the inconvenient shape of the remainder of the land, in short, “the disadvantages,” always were considered in determining the owner’s just compensation. The courts are bound from the very terms of the Constitution to consider the disadvantages. Note the peculiar language of the statute. Courts always took into consideration the value of the land. To this they added the disadvantages to the remaining land. Both sums make up the constitutional “just compensation.” “Just compensation” is wanting if either is left out.

Now the lawmaker adds to this that "The commissioners shall take into consideration *the advantages* as well as the disadvantages of the road to such person." When the commissioners take into consideration the advantages they exercise the taxing power. "This law is, indeed, nothing more in effect than the exercise of both powers of government in the same breath—that of taking the land by the right of eminent domain, and of requiring, *under the taxing power*, the adjacent landowners to contribute to the cost of it in proportion to the benefit each will derive from the road." (*Newby v. Platte County*, 25 Mo. loc. cit. 264.) This case was tried on an agreed statement of facts. One and one-half acres of land were taken, worth fifteen dollars per acre. This was the exercise of eminent domain. There is no suggestion of error in its exercise, Newby lost his land and got neither money nor benefits. There was no evidence of benefits: no admission of benefits. There must be evidence of benefits in the exercise of this tax-power and if no benefit be found there can be no tax; no withholding of this \$22.50 from Mr. Newby. The case was remanded for a new trial and the court below told in plain terms that this benefit must be a peculiar exceptional benefit, one accruing to Newby not enjoyed by the community at large, or by other property in the vicinity or neighborhood. He is just as much entitled to these general benefits as any other person in the community. This \$22.50 must not be taken from Mr. Newby by any *supposed* benefit or advantage. The court below was admonished that in the new trial to be had no part of this \$22.50 should be withheld from Mr. Newby by any *supposed* advantage. The tax power can not thus withhold or (which is the same thing) *take* this \$22.50 unless there is on the other side of the account its exact equivalent. Instruct these commissioners when they

retry this case that they can no more take or withhold this \$22.50 without just compensation than they can take or withhold his land without just compensation. When you consider the question of benefits you exercise the taxing power and in exercising this taxing power you must not take this \$22.50 unless its exact equal is in the remaining land in the form of this special peculiar exceptive benefit. The law for this particular kind of taxation which withholds this \$22.50 from Mr. Newby or takes it from him must be in accordance with the provision of the Constitution that "Private property shall not be taken for public use without just compensation." Here the taxing power is the offending power. It is no more so than in *Wells v. Weston*, 22 Mo. 384, or *Loan Association v. Topeka*, 20 Wall. 655.

"We have not as yet (A. D. 1857) many miles of railway, nor has the great body of land in the interior yet attained great value. By restricting the benefits, which the Legislature have declared may be set-off against the value of land taken for a public improvement, to such as are peculiar to the landowner and not shared by others whose land is not taken equally with him, growing dissatisfaction with existing legislation will probably be checked. It is evident that the advantages or benefits spoken of must have some limit. If the owner of land on the line of a railroad, part of which was taken for the road, should happen to own another tract half a mile from the road, the benefits which this last tract would receive from the improvement would not be considered; and yet such increased value of this second tract would be practically and in fact a benefit remotely derived from the road. But the Constitution intends to place the public burdens upon all, and, to do this, pays the proprietor of land for what is taken by the public. *If he is paid in advantages which the community at large, whose land is not taken, enjoy*

equally with himself, the spirit of the provision might be said to be violated. His loss is certain and specific, and in relation to the land which is not taken, he only receives the same benefit which others receive who have sustained no loss." [*Garrett v. St. Louis*, 25 Mo. loc. cit. 512.]

On the question as to what power of government is exercised, whether the taxing power or eminent domain, the court (page 514) say:

"When such persons [those whose land is taken in part and a part left] are assessed it can only be under the taxing power, since the power of eminent domain operates only on individuals and without reference to the amount or value exacted from any other individuals or class of individuals; but taxation 'operates upon a community or upon a class of persons in a community, and by some rule of apportionment.' When, therefore, it is clear that this assessment upon one class of lot-holders is an exercise of the taxing power, there is no reason why it should not be held to be an exercise of the same power upon the other class, whose lots are taken under the power of eminent domain, and paid for according to their exact value."

The court might properly have added the words, "by the tax levied." If the owner of land is paid in general advantages, private property has been taken for public use without just compensation. The compensation is ascertained and then in place of being paid, it is withheld on this plea of a set-off of general benefits. The plea of set-off is not a traverse; it is a confession and avoidance. It admits just compensation and it seeks to avoid it by this plea of set-off of benefits or advantages. Newby (in *Newby v. Platte County*) got neither cash nor benefits. Hence in remanding the case the court directed the court below to allow only these special peculiar benefits. The county admits it owes Newby

\$22.50 for the land taken and the burden of proof is on the county to prove this plea of discharge. There must be payment of this \$22.50 by (1) all cash, or (2) part cash and the balance in benefits, or (3) all benefits. This taxation power cannot be exercised unless there be (and the court must so find) special peculiar benefits not common to other property in the neighborhood. "The advantages of the road to such person," is the language of the statutes. An advantage to the whole community is an advantage to him. Everybody's land, including Newby's, is doubled in value. That is an advantage to Newby. But why make Mr. Newby pay for doubling the price of all the land in the neighborhood? That is the tax levied. If the law can compel him to pay part, it may compel payment of all.

If he has to pay for public work that doubles the sale value of all his land in common with all the other land in the neighborhood, it is wholly immaterial with Mr. Newby whether a list shall be made of all his real estate and personal property and the value thereof ascertained, and then take a certain per cent of that value and make him pay that, or ascertain the quantity of his land or the frontage on the road or the number of his horses or cows, and then make him pay according to the value of his land or its frontage or the number of his cows or horses or wagons, or their value. In remanding this cause to the court below, the Supreme Court of Missouri undertake to direct the court below that in the new trial of this cause Mr. Newby must not be robbed either by the front foot of his property or by the acre, or according to the value of his property, or according to the number or value of his cows or horses. It is the fact of robbery (or taking private property for public use without just compensation) and not the method of doing it that the Supreme Court direct the lower court to avoid in the new trial of the case. Newby

owned this land. He owned its exact equivalent, this \$22.50. It was the taxing power that withheld the money or took the money by withholding it from him. The public can no more *take this money* for public use without just compensation than it can take the land. The taxing power takes this \$22.50 without giving anything in return for it. The case was tried on an agreed statement of facts. There was no evidence of benefits. Hence the reversal of the judgment. The case was tried on an agreed statement of facts. "But it was not admitted that the road was any benefit to the party and the court we think could not infer this as a matter of law from the agreed facts." [S. C., *Newby v. Platte County*, 25 Mo. 275.]

That benefit is a conclusive presumption of law now. The evidence not offered in *Newby v. Platte County* is wholly incompetent now.

In *Garrett v. St. Louis*, St. Louis withheld \$763, a benefit tax, as a set-off to the value of the land taken in part and in part left. That amount was estimated as a benefit to the part left. It was deducted from his \$2,208.45, his "just compensation." There can be no tax of this kind unless there is a benefit and that benefit must not be a general benefit in common with other like property in the neighborhood, but it must be special, peculiar, exceptive. To have charged Garrett with general benefits would have done violence to that rule of constitutional law that "private property shall not be taken for public use without just compensation." If the public had taken all of Garrett's land, the public would have been bound to pay Mr. Garrett \$2,208.45, and the benefits to other lands would have been taken into consideration. The land on account of which \$763 was deducted from the whole compensation (\$2,208.45) now the property of Mr. Smith, will be assessed with \$763. Mr. Smith with others contributes to make up

this amount. If there be no benefit to Mr. Smith's land of the special character required, and Mr. Smith be compelled to pay, the public has received from Mr. Smith \$763 without giving him anything for it. The public has robbed Smith to pay Garrett. It would have been as well to have robbed Garrett at the start by not paying him for the land or by taking all his compensation from him or by withholding all or part of it. The public took Smith's \$763, or his land or his cattle or any other property, to pay Mr. Garrett for his land for this street. Smith got nothing for it and now the public on like principle will be compelled to take Jones' cattle to pay Smith. So the robbery has no end. The power that takes is the taxing power. The power that offends is the taxing power.

Suppose a third party (Smith) had owned this part of Mr. Garrett's land not taken for the street and on account of which seven hundred and sixty-three dollars was deducted on account of special benefits. Here, then, is a tax on Mr. Smith's land. Is there here any possibility for any one's property to be taken from him without an equivalent being paid for it? If Smith's land is not worth the tax, as before stated herein, and if the land shall sell for what it is worth, then Mr. Garrett will not get his just compensation and his property will have been taken for public use without just compensation, and Mr. Smith's land will have been sold for full value and he get nothing for it. The land of both parties has been effectually taken. If Smith's land be worth \$763, and sell for its value, then Mr. Garrett loses his land but gets full "just compensation." Smith loses his land, gets nothing for it, and the tax on Smith's land would be unconstitutional if there was only a general benefit to the land of Smith. Is it a constitutional tax if the general benefit is wanting? The courts say *No*. Is it a constitutional tax if there be a general damage? The courts now say *Yes*.

It is idle to say Mr. Smith's land has not been taken. It is idle to say his property has not been taken, in view of the fact that he has no possession or right to possession of the land and no right of property in it, and he has no possession of the money the land sold for, and no right to such possession.

What benefit is this express constitutional restriction to any property-owner if there be an implied power of local taxation to completely nullify it? In one case the public take the land by eminent domain without giving anything for it, and in the other the public take the money by taxation without giving anything for it. Moreover, taxes may be made payable in kind or in property, as well as in money, in the absence of any special restriction in the Constitution to that effect. This is well reasoned in *Lane County v. Oregon*, 7 Wallace 71.

"Now to the existence of the States, themselves necessary to the existence of the United States, the power of taxation is indispensable. It is an essential function of government. It was exercised by the Colonies; and when the Colonies became States, both before and after the formation of the Confederation, it was exercised by the new governments. Under the articles of Confederation the government of the United States was limited in the exercise of this power to requisitions upon the States, while the whole power of direct and indirect taxation of persons and property, whether by taxes on polls, or duties on imports, or duties on internal production, manufacture, or use, was acknowledged to belong exclusively to the States, without any other limitation than of non-interference with certain treaties made by Congress. The Constitution, it is true, greatly changed this condition of things. It gave the power to tax, both directly and indirectly, to the national government and subject to the one prohibi-

tion of any tax upon exports and to the conditions of uniformity in respect to indirect and of proportion in respect to direct taxes, the power was given without any express reservation. On the other hand, no power to tax exports or imports, except for a single purpose and to an insignificant extent, or to lay any duty on tonnage, was permitted to the States. In respect, however, to property, business, and persons, within their respective limits, their power of taxation remained and remains entire. It is indeed a concurrent power, and in case of a tax on the same subject by both governments, the claim of the United States as the Supreme authority must be preferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the States commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the state Constitution or through elections, and by the condition it must not be so used as to burden or embarrass the operation of the national government. There is nothing in the Constitution which contemplates or authorizes any direct abridgment of this power by national legislation. To the extent just indicated it is as complete in the States as the like power, within the limits of the Constitution, is complete in Congress. If, therefore, the condition of any State in the judgment of its legislature, requires the collection of taxes *in kind*, that is to say, by the delivery to the proper officers of a certain proportion of products, *or in gold or silver bullion, or in gold and silver coin, it is not easy to see upon what principle the national legislature can interfere with the exercise, to that end, of this power, original in the States, and never as yet surrendered.*" [Lane v. Oregon, 7 Wallace 71.]

This opinion is referred to and approved in *Hagar v. Reclamation District*, 111 U. S. 701, at 707, top, where the court say:

"It was the right of each State, to collect its taxes in such material as it might deem expedient, either in kind, that is to say by a *certain proportion of products*," etc., as above quoted.

The writer is not aware of any provision of the state Constitutions in terms requiring taxes to be paid in money further than that all property shall be taxed in proportion to value, a provision not applicable to local taxes. If the tax may be levied dischargeable in kind, why not make it dischargeable in gold coin, or silver coin, in gold bullion or silver bullion, in gold bars or silver bars or copper bars, or in labor, sand, lime, and cement. People in the rural districts have been bound to pay road tax in labor ever since we acquired Louisiana.

If a street is to be widened, why not authorize a tax of five feet on each side of the street payable in kind. Why not make it payable in this "just compensation" of the Constitution, and thereby totally nullify the constitutional restriction. Taxation is a necessary power of government, but that power may be restricted. It is said to be necessary, nevertheless it is restricted. It was not the intention of the framers of the Constitution to restrict the power of taxation only when taxation was *unnecessary*. The restriction may apply to a necessary tax. However necessary the tax may be, the State can not tax imports or exports. The state's Legislature should not be able to frame a law which will in effect destroy constitutional restrictions.

With the judicial construction now adopted the constitutional restriction should read thus: "Private property shall not be taken for public use without just compensation, except in the exercise of the power of lo-

cal taxation, or in the exercise of some other governmental power, or unless the Legislature deem it *necessary*."

Tithes under the English law were nothing more nor less than a tax payable in kind. Tithes (says Blackstone in book 2, chap. 3, subdivision 11) "Are defined to be the tenth part of the increase yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants; the first species being usually called *praedial* as of corn, grass, hops and wood; the second *mixed*, as of wool, milk, pigs, etc., consisting of natural products, but nurtured and preserved in part by the care of man, and of these the tenth must be paid in gross; the third, personal as of manual occupations, trades, fisheries and the like; and of these only the tenth part of the clear gains and profits is due."

The reader will notice that the English law took one tenth in kind and that, too, in gross. Personal tithes were an exception, but they yielded nothing if returns had to be made. There would be nothing net if human nature was then as now, and if we may give credence to the sermon at Stamford by Latimer, the reformer.

"All property subject to taxation shall be taxed in proportion to its value," does not require the Legislature to tax all property. Without this provision it could tax horses and exempt mules. The Legislature could determine the property to be taxed. It could leave all other property untaxed. But if the Legislature does select any particular property for taxation then the taxation must be according to value. St. George's Church in St. Louis had this exemption from general taxation (*Lockwood v. St. Louis*, 20 Mo. 20, at 22-3). But it was not exempted from this sewerage tax. Many exemptions from taxation are to be met with, but they seem to cover general taxes. They seem

not broad enough to cover special local taxes where the money is expended for the benefit of the property taxed. In the absence of any special limitation to the contrary in the state Constitution the Legislature is not bound to tax all property; it is not bound to subject all property to taxation (*State v. North & Scott*, 27 Mo. 464, loc cit. 483). The opinion in chief and the dissenting opinion agree in this (loc. cit. 491):

“It is admitted that the State may tax slaves and omit to tax land; that the State may tax four-year-old cattle and exempt all under that age from taxation; that horses may be taxed and mules be left untaxed.” In any case where land is condemned for public use, then, the condemnation money (the just compensation of the Constitution) may be taxed and all other property be left untaxed. The taxing authority is not governed by the Constitution in local taxes, certainly not as to rates. The rule of constitutional law was that “all property subject to taxation shall be taxed in proportion to its value.” This does not mean, never did mean, that all property shall be taxed or that all property is subjected to taxation. The meaning is “That all property subjected to taxation shall be taxed in proportion to its value.” “Subject” means “subjected,” and the power that “subjects to taxation” is the legislative power. We have no common-law tax in this country.

Egyptian Levee Company v. Hardin, 27 Mo. 495, is a case where the landowners, in a district of country subject to overflow, are organized into a corporation for the purpose of draining their lands, each landowner voting one vote for every forty acres he may own, and thus the officers are selected. Then for draining the land the board of directors levy a special tax of one dollar per acre, and if not paid it is recoverable by action of debt or its equivalent action. “The charter so

far as it authorized a tax per acre is unconstitutional," is the argument of the appellant landowners.

Whether this tax law would "take private property for public use without just compensation," if there was no general benefit or special, peculiar, exceptive benefit, was not discussed or considered or decided. After remarking that this kind of taxation is special, peculiar, local and that the constitutional restriction "All property subject to taxation shall be taxed in proportion to value," was intended to apply to general taxation for state or county or city purposes, the court says: "These local assessments (page 496) are not necessarily, under our Constitution, apportioned by reference to the value of the property assessed, but may be regulated by the value of the benefit which the improvement to which the money is devoted, is expected to confer on the proprietor."

It is said that this tax "ought to be according to the value of the benefit to be derived." The defense was "That the act of the Legislature was unconstitutional because the land was *taxed by the acre and not in proportion to its value.*"

The same learned judge had one year before rendered the opinion in *Garrett v. St. Louis*, wherein the court lay down a limitation on this taxing power not contained in the words of the statute conferring the authority. "It is evident that the advantages spoken of must have some limit." In the exercise of this taxing power benefits must have some limit. General benefits or public benefits, any benefit not exceptive, local, peculiar, must not be considered in exercising this taxing power. If these general benefits are taken into the account, then in the exercise of this taxing power there is a violation of the rule of constitutional law prohibiting, "taking private property for public use without just compensation."

The word "taxes" means burdens, charges or impositions put or set upon persons or property for public uses, and this is the definition which Lord Coke gives to the word "talliage" (2 Coke Inst. 532), and Lord Holt, in Carth. 438, gives the same definition in substance of the word "tax." To pay for the opening of a street in a ratio to the benefit, or advantage derived from it, is no burden. It is no "talliage" or "tax," within the meaning of the exemption.

"The charter of the levee company requires the tax to be regulated by the number of acres and not their value. This upon first impression might carry the appearance of injustice, but it is not very easy to see from all the facts disclosed in the record of this case that any practical injustice has been done" (page 499).

The question below and in the Supreme Court was a question of power. Did the power exist? Was the statute conferring the power consistent with the Constitution? From this record it does not appear that the land was benefited or damaged. That question was not before the court; it was not raised by court or counsel.

"Indeed, it is quite apparent that a taxation upon value and not quantity would in the hypothesis stated produce great inequality. The burden would not be distributed in proportion to the benefit." It seems that there is somewhere an obligation to distribute this burden in proportion to the benefit. *Newby v. Platte County* and *Garrett v. St. Louis* are certainly not intended to be overruled.

Mr. Hardin did not resist this tax in the court below or in the Supreme Court on the constitutional ground that this tax law took his property for public use without just compensation. The objection urged was that here property is taxed by the acre (not according to value as required by the Missouri Constitu-

tion). The decision was that the provision did not extend to local taxation, but only to general taxes for the State or county, town or city.

The first street-paving tax case to come before the Supreme Court of Missouri was that of *City of St. Joseph v. Anthony*, 30 Mo. 537 (A. D. 1860). The tax was "according to the frontage."

"The owners of the lots charged therewith shall be bound to pay said costs charged like liabilities contracted by themselves and may be sued therefor accordingly." And the tax-bill on each lot is a lien on that lot. The act incorporating St. Joseph was held unconstitutional by the lower court, on what ground does not appear from the opinion except by vague inference:

"The principal point on which this case is brought here has been several times before this court. In the case of *Inhabitants of Palmyra v. Morton*, 25 Mo. 594, and *Egyptian Levee Co. v. Hardin*, 27 Mo. 495, and *Garrett v. St. Louis*, 25 Mo. 505, the question was discussed and determined."

The above fifty words in four lines is the whole opinion on the subject. But the decision was a mere "*brutum fulmen*." The case is one example out of thousands where constitutional safeguards are disregarded. Says a recent writer (James M. Gray, on *Limitations of Taxing Power and Public Indebtedness*, A. D. 1906, sec. 1842, p. 943):

"The fact is that the practice in making these assessments grew up as a matter of public convenience without much regard to constitutional restrictions. The courts have twisted constitutional theories to suit the established practice."

The first Missouri case, cited *supra*, made the property-owner personally liable for the tax without any lien on the land. The statute gave only an action

of debt. The second case is decided on the ground that the tax is a benefit to the extent of the amount of it and that the benefit can be better estimated by the acre than by the value, and the third is not considered with reference to the provision of the Constitution in controversy in this and similar cases.

"It is evident that the advantages or benefits must have some limit" (*Garrett v. St. Louis*, 25 Mo. 512). If the advantages or benefits to Garrett must have some limits to avoid infringement of the constitutional provision that "private property shall not be taken for public use without just compensation," then the same rule applies to any other landowner on the street, no part of whose land is taken for the street.

The rule that sells his land to pay a benefit which is general, not special, peculiar, exceptive, is just as inimical to the rule of constitutional law in question as the rule that withholds part of his "just compensation" or condemnation money for a general benefit to that part of the land not taken, or that sells his adjoining land to pay it.

In *St. Joseph v. Anthony*, if the rule of law had been to assess the cost of the street-paving on the adjoining land according to the benefit, then the benefits in the *St. Joseph* case "must have had some limit" as well as in *Garrett v. St. Louis*. Then to sell the abutting land in the *St. Joseph* case for general benefits conferred by the paving, would be just as inimical to this rule of constitutional law as to retain part of the just compensation due to Mr. Garrett or to sell any abutting land for general benefits.

If this special tax-law, authorizing the levying of a special tax according to benefit, infringes the rule of constitutional law that "private property shall not be taken for public use without just compensation," in cases where the benefit is general, will it be a less in-

fringement of that rule if the same amount is taken apportioned according to value or according to frontage, or by the acre or by the square yard?

In condemnation cases it is general constitutional law that the "just compensation" required by the Constitution may be diminished by these special, peculiar, exceptive benefits not enjoyed in common with other landowners in the vicinity. This just compensation is made up of the value of the land taken and damages to the remainder of the land not taken. So far no power is exercised except that of eminent domain. When benefits or advantages are considered, then the power of taxation is exercised. The power that ascertains these special, peculiar, exceptive benefits and deducts them from the "just compensation" of the owner of the land taken for public use, is the taxing power.

If in place of deducting these advantages or benefits from the "just compensation," they be made a lien or charge on the abutting land or on other land or other property, the power exercised is still the taxing power. The constitutional provision that "All property subject to taxation shall be taxed in proportion to its value," does not apply to local taxation. For general and special taxation the taxing power may take one hundred per cent. No constitutional restriction as to rates will apply to special taxes, unless so expressed in very plain terms. It is an exemption from taxation to be strictly construed against the lotowner, but liberally for the city and contractor. In *Garrett v. St. Louis*, 25 Mo. 505, Garrett's "just compensation" was assessed at \$2,208. The public can not acquire title to Mr. Garrett's land without paying him for it. The necessary funds can be obtained only by taxation, general or special, on all the property of the State, or on all the property of the county, or on all the property of the city. The legislative power is restricted in tax-

ation of property; it must be according to value. It was not (prior to 1875) restricted as to rates and if some other constitutional provision does not prevent, the legislative power may tax one hundred per cent. In every condemnation, the "just compensation" of the owner may be taken by taxing it one hundred per cent.

If a man own two acres of land, may the public take one acre at its value (\$100) and then tax the \$100 one hundred per cent to pay it, or sell the other acre to pay it? Sell the acre not taken to Smith for its value (one hundred dollars) and pay the owner his "just compensation." He had two acres of land worth \$200; now he has no land and only one hundred dollars.

What prevents the State from opening a road through all the lands of any farming district and ascertaining the "just compensation" therefor, and then tax the adjoining property (damaged though it may be) to pay the amount. We, indeed, hold our real estate by a mere "rope of sand." This boasted Constitution, indeed, "Holds the word of promise to the ear but breaks it to the hope."

This "just compensation" must in all cases be subject to be taxed the same as all other property in the State. If the road be made a state burden, then this "just compensation" must or may be taxed along with all other property of the State in proportion to its value. This "just compensation" may in like manner be subjected to a county tax or city tax for a like purpose. The whole fund necessary to pay this "just compensation" may be raised by a general state tax, or general county tax, or general city tax. If the legislative power may thus tax this fund to a small degree, that power may tax it to a large degree in the absence of any constitutional restrictions as to rate or per cent (and there is none in terms in local taxation).

The express rule of constitutional law that "Pri-

vate property shall not be taken for public use without just compensation," controls this implied rule that the power to tax is without any restraints because none are expressed "*eo nomine*" and in terms.

Now to levy a local tax is unconstitutional if there is a general benefit. It is constitutional to levy the same tax by the front foot even if there be a damage.

A general benefit defeats the one law as unconstitutional; a general damage saves the other as being perfectly constitutional.

CHAPTER 3.

PERSONAL LIABILITY FOR A LOCAL TAX.

We have seen in the foregoing chapters that this inherent power of taxation is limited by the Constitution. First, we have this express limitation: "All property subject to taxation must be taxed in proportion to its value." We have seen that this power of taxation is further limited: A state statute purporting to authorize a city or town to tax persons or property beyond its corporate limits is void as an authority on the ground that it takes private property for public use without just compensation or that it takes private property for private use. We have in the third place considered the taxation features of our condemnation laws that the advantages as well as the disadvantages shall be considered in estimating "just compensation," and that a statute allowing a deduction from this "just compensation" of benefits or advantages, general in their character, not special, peculiar, exceptive, is void, because as a tax-law it takes private property for public use without just compensation. We come now to a fourth limitation on this power to tax, and that is in the constitutional validity of a law imposing a personal liability for a local tax. A local tax-law imposing a personal liability on the owner of property is invalid. It takes private property for public use without just compensation.

The *City of St. Louis to the use of Seibert v. Allen*, 53 Mo. 44, is a case wherein the personal liability

feature of statute laws for local taxation is considered. Suit was brought to enforce the collection of special tax-bills for macadamizing the Gravois road in front of the property of defendant Allen. The tax-bills were made a charge on the land according to frontage on the road, and the statute in form authorized a personal judgment against the owner of the property. The court rendered judgment on two tax-bills jointly against two lots or distinct parcels of land, thus making each parcel subject to a lien for the amount of both tax-bills in place of each parcel being charged only with its share. So much of the judgment as was a lien was remitted, and thereupon a personal judgment was rendered against Mr. Allen. After an unsuccessful motion for a new trial, he appealed.

In rendering the opinion, the court observe that in *City of St. Louis to use of McGrath v. Clemmons*, 36 Mo. 467, *City of St. Louis to use of Lohrum v. Coons*, 37 Mo. 44, *Fowler v. City of St. Joseph*, 37 Mo. 228, and *Inhabitants of Palmyra v. Morton*, 25 Mo. 593, personal judgments were rendered against the owners of the lands taxed under statutes in form authorizing such judgments, but the constitutional power to authorize a personal judgment was never discussed or decided. The court quote from *Taylor v. Palmer*, 31 Cal. 240, thus:

“To say that the owner of land bordering upon an improved street can be made personally responsible for the payment of the improvement, is equivalent to saying, that his entire estate, real, personal and mixed whether bordering upon the street or remote from it, whether benefited or not, shall be held responsible for the tax.”

After some observations as to the foundation of the right to levy taxes of this kind this court says (p. 55):

“It will not be presumed, that it was ever intended

that a corporation in the exercise of this high prerogative should absorb the whole value of a person's property, and then come on him for the deficit. The very idea of such an assumption on the part of either the city or the state legislature, would be sufficient to startle one who had even the most crude notion of the objects and purposes of a just or enlightened government. The idea that a city could improve a street and assess the property benefited thereby and sell the entire property and then go on the owner, who may reside out of the city, and sell his property there to pay the balance of the assessment, and this all in consideration of the benefit conferred on his property, which was already sold, would seem at least in its results like taking the property of the owner and converting it into public use without any just compensation. I do not believe that by this indirection you can do that which is forbidden by the Constitution if directly done. If a personal judgment can be rendered in such case, all this may happen. It is true, it is not likely to happen, but the fact, that it may possibly happen, is enough to condemn the law."

If this personal judgment is to stand, execution may issue and all of Mr. Allen's property in St. Louis may be sold, and yet the execution may be returned unsatisfied in part; an alias execution may be issued to Jackson county, Missouri, and his farm lands in Jackson county (distant more than two hundred miles from St. Louis and this Gravois road, and in no way benefited by this macadamizing on the Gravois road in St. Louis) may be sold and his title and property forever pass from him. This sale and conveyance (*in invitum*) of Mr. Allen's farm lands in Jackson county, Missouri, remote from the street macadamized and not benefited by that macadamizing, constitutes a taking of

Mr. Allen's farm lands in Jackson county, Missouri, for public use without just compensation. The statute attempting to authorize it is invalid. In all execution sales the courts have control over their own process and will so control execution sales as not to sacrifice the property of the execution defendant. The presumption is that property will sell at public auction for its full value. In fact one of the ways to ascertain the value of property is to sell it publicly at auction. This St. Louis tax-law is invalid because it takes "private property for public use without just compensation." The law is unconstitutional in the particular indicated.

It seems the court here did not indulge the conclusive presumption that the property was benefited to the full amount of the tax-bills.

Higgins v. Ausmus, 77 Mo. 351, et seq. (A. D. 1883), is another case involving the constitutional validity of local taxation laws, where such effect anything except a lien or charge on the particular lot on the street. Ausmus the defendant and appellant was the tax collector of the town of Linneus in Linn county, Missouri. The tax collector was by law authorized to seize and sell personal property to pay any land tax. (This is the statute law generally throughout the United States.) The tax-books were prima facie evidence (by statute) in favor of the collector and were prima facie authority to seize and sell (the same as on execution) personal property to pay a land tax. Higgins the plaintiff owned a lot in Linneus in Linn county, Missouri. A sidewalk was constructed under ordinance and contract in front of Mr. Higgins' lot, the cost of which was under the statute a lien or charge against the lot. General taxes were levied on this lot. The general tax and the local tax were delinquent and were in the hands of defendant Ausmus as collector for col-

lection. Mr. Higgins paid his general taxes, but he refused to pay this sidewalk tax amounting to \$8.64, claiming as a defense that he had the right to make the sidewalk himself and he was given no opportunity to do so. Ausmus, the collector, having the tax-books in his possession, seized two stoves belonging to Mr. Higgins and was proceeding to sell the stoves to pay this sidewalk tax. Mr. Higgins replevied the stoves before a justice of the peace, where he had judgment in his favor, as also in the circuit court on appeal by defendant Ausmus, the collector. The case, although it involved only \$8.64, was appealed to the Supreme Court of the State where the judgment was affirmed. Defendant Ausmus asked an instruction in the trial in the circuit court to the effect that "The tax-book is sufficient to authorize him [the collector] from the tax-book alone to enforce the payment of its taxes by levy, seizure and sale of personal property for due and unpaid taxes," and that the finding must be for the defendant. This was refused, excepted to, and assigned for error in the Supreme Court. It seems from the evidence that this special tax was placed on the tax-books by the collector without authority, and therefore the tax-book had no authority by law like an execution. The court hold that upon either of the two views the judgment must be affirmed. The statute is held invalid as an authority. The opinion on the constitutional question is thus (p. 353):

"There can be no question but that a tax-book, emanating from proper authority, and placed in the hands of one authorized to collect the taxes therein contained when it came to his hands, would be a valid process and authorize the collector to levy upon property of a delinquent taxpayer to enforce payment, but when it appears, as we think it does in this case, that the special tax for the non-payment of which the stoves in ques-

tion were levied upon, was for street or sidewalk improvements in front or opposite defendant's real estate, it did not confer upon the collector any authority to levy upon defendant's personal property, it having been held by this court in the case of *City of St. Louis v. Allen*, 53 Mo. 44, that such a special tax or assessment can only be enforced against the said real estate, and that a personal judgment for such a tax against the owner is null and void, and statutes authorizing such judgments are unconstitutional and void. It was also so held in the case of *City of Louisiana v. Miller*, 66 Mo. 467."

The rule of constitutional law that "All property subject to taxation shall be taxed in proportion to its value," is not infringed.

"Private property shall not be taken for public use without just compensation," is the rule of constitutional law violated.

The *City of Pleasant Hill v. Dasher*, 120 Mo. 675, affords another illustration that a tax law may infringe the rule of constitutional law that "Private property shall not be taken for public use without just compensation."

The City of Pleasant Hill had a special charter from the Legislature of the State (Laws 1858-9, p. 155). The eleventh section of that act was as follows:

"The council shall have power to cause the owners or occupiers of real estate to pave and repair sidewalks adjacent to the property which they may own or occupy; and if any such owner or occupier shall fail to pave or repair the same, as required by ordinance, the council may cause the same to be done, and *may recover the full expense thereof by an action of debt in the name of the corporation.*"

In Missouri, after August 2, 1875, the time the new Constitution went into effect special charters can not be

granted by the Legislature to cities, towns or villages (Const. art. 9, sec. 7). These municipal corporations must be classified into classes not exceeding four, and the power of each class shall be defined by general laws. And municipal corporations then under special laws could not be compelled to give up their charters. Laws were to be passed to authorize them to elect to come under the general laws.

The *City of St. Louis to use v. Allen* was decided in the year 1873 and this decision rendered invalid nearly all the special charters in the State granted from the time of the admission of the State into the Union. Cities, towns and villages were organized also under general laws. This action of debt was a prominent feature of all these laws. In fact, an action of debt seems to have been (as at common law) the appropriate action to recover any penalty or any amount due by statute. In March, 1887, fourteen years after the decision in *City of St. Louis to use v. Allen*, the Legislature of Missouri passed an act (Laws 1887, p. 95) that all cities of ten thousand inhabitants or less, acting under a special charter, may cause owners or occupiers to pave sidewalks, making the cost a lien on the lot and providing for its enforcement in court. The court say (p. 680): "The act of 1887 was no doubt passed in view of what was said by this court in the case of the *City of St. Louis to use v. Allen*, supra, and repeated in subsequent cases."

In approaching the subject under consideration the court says:

"The question then arises, whether the city has and possesses both remedies, or whether the enforcement of the lien is the only remedy? In short, does the act of 1887 repeal section 2 of the Charter?"

"In disposing of this question, it is well to bear in mind the former adjudications of this court. *Neenan*

v. Smith, 50 Mo. 528, was an action to collect tax-bills for macadamizing a street. It was held that plaintiff was not entitled to a general judgment against the owner of the land, and doubt was expressed whether the Legislature had the power to authorize a general judgment in such cases. The authorities on this question were reviewed in the subsequent case of *St. Louis to use v. Allen*, 53 Mo. 44, and it was held in clear and distinct terms that the Legislature had no power to authorize a personal judgment against the property-owner in suits to recover these local assessments. The ruling made in that case has been approved in a number of subsequent cases." The rule of constitutional law infringed is that "Private property shall not be taken for public use without just compensation."

This tax-law authorized a personal judgment and was therefore unconstitutional and void. The general judgment was a lien on all lands and all these lands could be sold and the title divested from the owner by sheriff's deed. If it be thus unconstitutional to divest his title to property under a general judgment declared by statute to be a lien to be enforced by execution and sale, can the Constitution be evaded by the law authorizing the tax-bill to be a lien just like the general judgment lien and effect a divestiture of title in the same way? With the general judgment, the lien is unconstitutional. How can the lien be made better without the judgment, execution sale and sheriff's deed? Can the lien be made any better without the judgment than with it? We have been dealing with tax-bills made liens on abutting property only. If the Constitution prohibits a general judgment, a general judgment lien, an execution, levy, sale and sheriff's deed, will the Constitution permit a statute accomplishing the same results by authorizing a tax-bill and making it a lien on all property on which the general judgment is a lien?

The intention of the Constitution as determined in these decisions is, that no property, except abutting property, shall be subjected to this local tax. Can the Constitution be evaded by enacting a law making the tax-bill a lien on all the real estate and personal property of the owner in the town or city? If the tax-bill lien may be extended a foot beyond abutting property, it may be extended a mile. Mr. Higgins' stoves could not be taken (*Higgins v. Ausmus*, 77 Mo. 351), for that eight-dollar sidewalk tax-bill. Could they take a lot two blocks away, not abutting on the street? Could they take his wagon and team or his farm? Does the Constitution prohibit a name or a thing? Is it competent for the Legislature to enact a law (as was attempted in the proposed charter for Kansas City, defeated by popular vote in March, 1905), authorizing an extension of the lien beyond abutting property, whether benefited or not? If the city council may, by its charter as its law, tax abutting property for grading a street in front of it when the grading is a damage to that abutting property, no reason can be perceived why distant property not damaged should not be taxed. If the law may make the tax a lien on land a foot distant from abutting property, it may make it a lien on land distant one mile, or anywhere in the city.

CHAPTER 4.

EFFECT OF THE DECISION IN THE CITY OF ST. LOUIS TO USE OF SEIBERT V. ALLEN, 53 Mo. 44.

A little attention to the history of the law and the development of the rights of the individual as against the public, the king, the State, the United States, will show the importance of this decision.

Under the English common law there were scarcely any exemptions from execution sales on judgments against the owner. The person was sacred; so nothing could be taken from the person. But the execution was against the man, his goods and chattels, and in Missouri his real estate. A homestead does not exist except by force of statute law so far as being safe against the execution creditor. In the early history of the law the execution creditor took all the personal property, all the real estate, all property of every kind, and then sent the execution defendant to jail, there to remain till the debt was paid.

Under such a state of the law, it was or would have been almost an idle ceremony to make these local taxes a lien on the land. Hence, the action of debt was given in almost all cases. Thereby all that the individual had and all he might acquire afterwards was subject to this charge or tax made by the king, the state, the United States. "The owners of the lots charged therewith [the cost of the improvement] shall be bound to pay said costs charged *like liabilities contracted by themselves, and may be sued therefor accordingly,*" says the St. Joseph charter as late as A. D. 1860, and quoted in *City of St. Joseph v. Anthony*, 30 Mo. 537, at 538, bottom.

The power or authority adjudged valid in *Inhabitants of Palmyra v. Morton*, 25 Mo. 593, was "To have the footways and sidewalks of the streets paved at the expense of the owners or occupiers of the adjacent lots; and if such owner or occupier fail to pave the same as directed by ordinance, said trustees shall pave the same and recover the full expense thereof from such owner or occupier, before any court of competent jurisdiction by action of debt." This statute gives a general judgment without any lien on the abutting land. This general judgment is void. The statute authorizing it is void. It authorizes the taking of private property for public use without just compensation.

"The constitutional power to authorize the rendition of a personal judgment in such case was not considered or argued" (53 Mo. 44, at 51). *Inhabitants of Palmyra v. Morton*, 25 Mo. 593, was decided in October, 1857; *City of St. Louis to use v. Allen*, 53 Mo. 44, in March, 1873. The two decisions are thus less than sixteen years apart in point of time. On principle they are the antipodes of each other on American constitutional law.

The argument advanced in *Inhabitants of Palmyra v. Morton*, 25 Mo. 593, as stated in the opinion of the court is, that "It is obnoxious to the constitutional provision which declares that private property shall not be taken for public use without just compensation. It may be observed, in the first place, that there is no attempt here to exercise the right of eminent domain; for it was not proposed to condemn the defendant's property to public use, and it is unnecessary to discuss the character, extent or limitation of that power."

The judgment is different in *St. Louis to use v. Allen*, 53 Mo. 44. By that judgment private property is taken for public use without just compensation. In *Inhabitants of Palmyra v. Morton* the court decline to discuss the question.

In "An Act concerning towns in this Territory," in Laws of Louisiana 1804-8, adopted (under Act of Congress) by Meriwether Lewis, governor, and John B. C. Lucas and Otho Shrader, judges of Louisiana Territory, on page 259, Laws Louisiana Territory, part one, sec. 5, we find it enacted under date of June 8, 1808, that the trustees of towns have the power to "Cause the streets to be cleared and repaired by the inhabitants thereof, and if any of them shall refuse to clear or repair the part assigned to them, the trustees may hire the clearing and repairing of the same and levy and collect the price thereof on the persons so failing and refusing."

This was five years after we acquired Louisiana. It was four years before Missouri Territory was formed—eight years before the Territory of Missouri adopted the English common law—thirteen years before the State of Missouri was admitted into the Union of states. The territorial Legislature of Missouri Territory adopted the same law in the same language at its first session in 1813-14 (Laws of Missouri Territory, 1813, p. 63-4, sec. —). This was also the language of the Revised Statutes of the State of Missouri of A. D. 1825, vol. 2, p. 766, sec. 5; Revised Statutes 1835, p. 602, sec. 7; Revised Statutes 1845, p. 1050, sec. 9; Revised Statutes 1855, vol. 2, p. 1527, sec. 12; General Statutes 1865, p. 242, sec. 12; Revised Statutes 1879, vol. 2, p. 995, sec. 5015; Revised Statutes 1889, vol. 1, p. 464, sec. 1677; but by Revised Statutes 1899, vol. 2, pp. 1411-12, sec. 6016, it becomes a lien only.

The road law of Missouri has always had similar defects. Missouri Territory, by its first Legislature, enacted road laws. If the owner consented, the road was opened; but if he refused to assent then commissioners were appointed to assess his damages, but the road law contained this remarkable (to this writer at least) provision:

“And provided, also, that nothing shall be allowed to any person or persons where such road passes through his or their unimproved lands.” (Laws Missouri Territory 1813, p. 73-4.)

This provision is retained in Revised Statutes 1825, vol. 2, p. 689, sec. 3, at end. If they may be authorized to take twenty feet they may take a mile. Even as late as 1888 the Congress of the United States enacted that in condemnation proceedings of dams of the Monongehala Navigation Company on that river, the commissioners assessing damages should not allow anything for the franchise. (U. S. Statutes at Large, vol. 25, 400-411, c. 860), but this was held void. [148 U. S. 312, *Monongehala Navigation Co. v. U. S.*]

In *Inhabitants of Palmyra v. Morton*, 25 Mo. 593, there was involved the validity of a sidewalk repair tax under a statute not giving a lien on the land in front of which the repairs were made, but merely an action of debt against either the owner or occupant.

“There is no attempt here to exercise the right of eminent domain, for it was not proposed to condemn defendant’s land to public use, and it is unnecessary to discuss the character, extent or limitation of that power.”

In *City of St. Louis to use v. Allen*, 53 Mo. 44, it was not proposed to condemn Mr. Allen’s land to public use.

In *Higgins v. Ausmus*, 77 Mo. 351, it was not proposed to condemn Mr. Higgins’ stoves to public use.

In *City of Pleasant Hill v. Dasher*, 120 Mo. 675, it was not proposed to condemn Mr. Dasher’s lot to public use.

In *Wells v. Weston*, 22 Mo. 384, it was not proposed to condemn Mr. Wells’ land to public use.

In *Town of Cameron v. Stephenson*, 69 Mo. 372, it

was not proposed to condemn Mr. Stephenson's lots (outside of the town) to public use.

In *City of St. Louis v. Hill*, 116 Mo. 527, it was not proposed to condemn the forty feet front of each lot on this boulevard to public use.

This constitutional restriction is confined to too narrow limits when that great bulwark of the rights of man is made to read thus: "Private property shall not be taken for public use in the exercise of the right of eminent domain without just compensation; it may be taken for public use in the exercise of any governmental power other than that of eminent domain without paying or being bound to pay anything for it." If this be legally true, then the constitutional right to hold private property has been reduced to an exceedingly attenuated shadow. The Constitution merely prohibits a name.

Constitutional provisions formerly read thus: "Private property shall not be taken or applied to public use without just compensation." Its language has been changed generally to "Private property shall not be taken or damaged for public use without just compensation." The damaging prohibited is not applied alone to cases involving the exercise of the right of eminent domain. Private property shall not be taken or damaged for public use in the exercise of the right of eminent domain, or in the exercise of any other governmental power. It can not be done directly or indirectly through any disguise or subterfuge, or under any mask or pretense.

The decision that a statute law, making either owner or occupant personally liable for a local tax, is in violation of the Constitution of the State in permitting or authorizing "Taking private property for public use without just compensation," was scarcely less than a revolution in the constitutional law and history of the State. It was effected in the short space of less than

sixteen years. The mere occupant of town property was by these laws made personally liable for the cost of the improvement, binding all he had and all his future acquisitions. Indeed, this was "sufficient to startle one who had even the most crude notion of the objects and purposes of a just or enlightened government" (53 Mo. loc. cit. 55). Indeed, this is "taking the property of the owner and converting it to public use without any just compensation" (53 Mo. 55). This tax-law is in conflict with the state Constitution providing that "private property shall not be taken for public use without just compensation." This statute law—this tax law—does not infringe that provision of the state Constitution requiring that "All property subject to taxation shall be taxed in proportion to its value." This revolution in constitutional law is thus commented on in *Sadler v. Roth*, 59 Mo. 400, at 402 (March, 1875):

"The Acts of 1867, 1870, and 1871, in relation to special tax-bills in the city of St. Louis, appear to have been devised with a view of creating a personal liability on the part of the owner of the property charged, and since the decisions of this court in the case of *Neehan v. Smith* (50 Mo. 525), and the *City of St. Louis v. Allen* (53 Mo. 44), holding that no personal judgment can be rendered in such case, the unity and consistency of the acts having in a measure been destroyed, it is a task not altogether without difficulty to determine what force and effect shall be given to the portions remaining undisturbed by judicial decision."

Some fuller statement ought to be made as to the case of *Zoeller v. Kellogg*, 4 Mo. App. 163 (A. D. 1877), referred to in *Norwood v. Baker*, 172 U. S. 269, and elsewhere herein.

In July, 1868, defendant Kellogg owned sixty-nine feet front on two streets, occupying two blocks in St. Louis, Missouri. A strip fifty feet wide was con-

demned for Mercer street, leaving of the sixty-nine feet, seven and one-half feet on one side and eleven and one-half feet on the other side. Then the new street was paved, curbed and guttered, and tax-bills issued against these small strips of ground to the amount of \$1,488.16 face value. These tax-bills were issued in 1873. The trial, or rather the decision, was made June 12, 1877, in the St. Louis Court of Appeals. The court at the instance of the plaintiff, the holder of these tax-bills, gave this instruction (p. 164):

"If the court, sitting as a jury, believe from the evidence that the work and materials charged for in the bills sued on were furnished, and that the work described in said bills was executed according to the contract, then the plaintiff is entitled to recover, without regard to the value of the land upon which the lien is sought in this suit."

Defendant excepted to the giving of this instruction and after an unsuccessful motion for a new trial sued out a writ of error and the trial was on this record. Plaintiff obtained a judgment below for \$1,642.55 against this lot, "worth not more than \$1,025." The judgment was reversed and the case remanded for a new trial. A rehearing was granted and on second argument the judgment was again reversed and the case remanded. Judge Lewis rendered the opinion both on the original hearing and on the rehearing.

"A power which compels a man to pay for work and materials which he has neither asked for nor consented to receive, or else to surrender part of his property to another, seems so repugnant to all ideas of that personal protection which is the chief end of civil government that we must be able to refer it to some distinct basis of constitutional authority. It can not stand upon the power of taxation for it lacks, in all cases, the essential characteristics of equality and uniformity. To

tax one man alone for a specific item in the public outlay would be in principle, no better than to tax him for all the expenses of the municipal government. The only constitutional basis upon which the assumed power can rest at all is the right of taking private property for the public use, upon just compensation being made therefor.

“Our Supreme Court has repeatedly said that local assessments for improvements ‘Is not considered as a burden, but as an equivalent or compensation for the enhanced value which the property derives from the improvement’ (*Lockwood v. City of St. Louis*, 24 Mo. 20; *Shehan v. The Good Samaritan Hospital*, 50 Mo. 155; *City of St. Louis v. Allen*, 53 Mo. 54). The converse of this proposition must be equally true; so that the enhanced value which the property derives from the improvement is, practically, the compensation which the owner gets for the assessment against it. This assessment to be enforced as a lien which may subject the property to a sale and transfer from the owner is, in effect, a taking of the property.

“The requirement of a just compensation to be made for private property taken for public use . . . applies as well where the value or a part of the value of the property is taken by being subjected to the payment of a sum of money, as where the property itself, or some interest therein, is directly taken for public use” (*Creighton v. Manson*, 27 Cal. 627).

“This brings us to the question whether, if the instruction given in the present case was correct, the defendant was thus left secure in his constitutional right of ‘just compensation’ for the property so devoted to the public use.

“The real value of the lots being less than the amount assessed upon them, the whole property would be necessarily absorbed for satisfaction of the lien. The

owner as a member of the community, would derive a certain benefit from the improvements, in common with all other citizens. But this being simply his right, independently of the transfer, would not be compensation in any sense. [*Newby v. Platte County*, 25 Mo. 258.] The enhanced value of the property would be nothing to him, since it must pass into other hands. *His private property is thus literally taken for public use, without just compensation or any compensation at all.*

“An instruction which thus makes possible a palpable violation of constitutional rights is necessarily erroneous. It may follow with literal exactness the terms of the legislative authority conveyed in the city charter. But the Legislature can confer no power which is constitutionally forbidden to every department of civil authority.

“Constitutional guaranties must be paramount, not merely in form, but in substance. Courts can not sustain them otherwise than by *looking to the ultimate effect and operation of an enactment or other measure as well as to the shape of its presentation.*

“We are of the opinion that no just compensation is made, within the requirement of the Constitution, when private property is taken without any benefit to the owner; and that an assessment upon property for public improvements to an amount exceeding the value of the property is unconstitutional and void, *by whatever agency imposed.*”

The judgment was reversed and the cause remanded, but a rehearing was granted and the same judge rendered the opinion on the rehearing. The court say:

“Upon a second hearing of this cause, the defendant in error insists that the municipal authority to make assessments for local improvement is in nowise

referable to the right of eminent domain, but inheres in the taxing power alone. From this he argues that the constitutional guaranty against the taking of private property for public purposes without just compensation is not infringed when such an assessment exceeds in amount the value of the property assessed, so that the owner must needs be deprived of his property, as well as of the special benefits which, in theory, are supposed to afford a remuneration for the assessment. If he thus loses all and gets absolutely nothing in return, this is held, nevertheless, to be a constitutional exercise of the taxing power.

“It may be admitted that most of the authorities cited refer the authority under consideration to the taxing power and deny that its origin is in eminent domain. But in considering a question of constitutional protection, the nominal source of an assumed power is of far less moment than the effects of its exercise. The power of taxation is inferred from the general grant of legislative authority. But, like all general grants, it must yield whenever found in conflict with any special restriction. The restriction requiring just compensation when one’s property is taken for public purposes is usually applicable in practice, to the power of eminent domain. If, however, in a peculiar state of facts, it shall be found directly hostile to a certain exercise of the taxing power, or of any other power, the restriction will be supreme, and the power must so far be surrendered.

“The argument of counsel admits a distinction between the power to impose taxes for general purposes and the power to make assessments upon property to defray the expenses of local improvements. The distinction is really so broad that our Supreme Court has said: ‘The whole theory of local taxation or assessments is that the improvements for which they are lev-

ied afford a remuneration in the way of benefits. A law which would attempt to make one person or a given number of persons, under the guise of local assessments, pay a general revenue for the public at large, would not be an exercise of the taxing power, but an act of confiscation' (*McCormack v. Patchen*, 53 Mo. 36).

"It is thus seen that while special remuneration has no concern with taxation for general purposes, it is inseparable from the theory which sanctions assessments for local improvements. If the special 'remuneration in the way of benefits' be eliminated, then the improvements are exclusively in the interest of the general public, and the money raised to pay for them is, in effect a section of the 'general revenue for the public at large,' levied under the guise of local assessments. 'This is, literally, confiscation,' which is merely a mode forbidden, like every other, of taking private property for public purposes, without just compensation to the owner. If, in the present case, the defendant's entire property is to be subjected to the claim asserted for the plaintiff, he will unquestionably be giving up his substance to the uses of the public, and to its revenues, also, with no shadow of that 'remuneration in the way of benefits' on which the right of local assessments depends. The judgment is again reversed and the cause remanded. It is gratifying to reflect [say the court in conclusion] that the vital question involved is one which secures the right of appeal to a tribunal whose wisdom will correct any erroneous views herein admitted, and whose determination will be final." That right was not exercised.

Here this property, after all the benefits accruing from this public improvement have been added to it, was worth \$1,025, and in the opinion in chief and on rehearing the tax was held to be unconstitutional. The tax accrued prior to the Constitution of 1875 and was

hence not affected by the restrictions contained in that instrument. But this decision has been completely, silently overruled. The opposite doctrine has been irrevocably established. These special assessments were not embraced and were not intended to be embraced in the restrictions on taxation written in the Missouri Constitution of 1875. The reasons assigned were that these taxes were for benefits conferred and the benefit had to be special, peculiar and exceptive; a general benefit rendered the tax unconstitutional. The reader will note that this is a tax of one-hundred and sixty-three per cent on the land and accrued benefits, and we are told this is not a burden. Some of us have in our vain imaginings supposed that a local tax on our lands and houses amounting to one-hundred per cent was a burden but it is not. Here is a tax of one-hundred and sixty-three per cent on this land with the accrued benefits but it is *really* not a burden. It is the Constitution of the State of Missouri that says this tax of one-hundred and sixty-three per cent is not a burden. I wish to call the attention of the reader to this State of our constitutional law. In its iniquity it is not exceeded in the history of the race.

At one time the Constitution of the United States was invoked in *Dred Scott v. Sanford*, and a decision was rendered by the Supreme Court of the United States construing the Constitution of the United States (and that decision became a part of that Constitution). The Constitution of the United States thus construed was denounced as "A league with hell and a covenant with the devil," but we submit that this Missouri Constitution is *hell itself*, and it beats the old devil sixty-three per cent.

Now the law would not be satisfied with less than sixty-three per cent more than the entire value of land, improvement and benefit.

On December 7, 1886, a little over nine years after the rendition of the opinion in *Zoeller v. Kellogg*, 4 Mo. App. 163, the St. Louis Court of Appeals rendered another opinion in a similar case of special tax on real estate. The judge who rendered the opinion in *Zoeller v. Kellogg*, 4 Mo. App. supra, was on the bench then, and concurred in this opinion seemingly widely at variance with the opinion in *Zoeller v. Kellogg*. The case referred to is that of *Allen v. Kremling*, 23 Mo. App. 561. At 568, bottom paragraph, the court say:

“When the present city charter (St. Louis) was adopted, there was no limitation, either by legislative provision, or judicial construction, on the city’s power in levying these special taxes. The courts had uniformly decided that the city’s power under former charters, to improve its streets and charge the cost of the improvement on the adjoining property, was a continuing power. That this power might be exercised from time to time, as the wants of the municipal corporation might require, and that of the necessity or expediency of its exercise, the governing body of the corporation was the sole judge (*McCormack v. Patchen*, 53 Mo. 33). It is true that the theory upon which the constitutional validity of such taxes was upheld was one of a corresponding special benefit resulting to the property from the improvement (*Neenan v. Smith*, 50 Mo. 525), but since the property-owner could never be heard to say that his property had not in fact been benefited, in opposition to the legislative declaration that it had, the theory of assessments was one which he could never practically controvert. (*Seibert v. Tiffany*, 8 Mo. App. 33). [Two years before this decision viz., October term, 1884, the Supreme Court of Missouri had said in *City of Kansas to use of Coates v. Ridenour*, 84 Mo. 253, at 261, that the property-owner when sued on a tax-bill may “entirely defeat a recovery by overthrowing the theory of benefits conferred.”] An instance of

seeming departure from the law, as above stated, is found in *Zoeller v. Kellogg* (4 Mo. App. 163), where the court held that the assessment of a special tax, in excess of the entire value of the lot, was equivalent to confiscation, and could not be upheld on the theory of a special benefit to the lot; but it will be noticed that the court arrived at that result by treating the assessment as being in the nature of an exercise of the power of eminent domain and not as an exercise of the taxing power, a holding which in view of subsequent decisions of the Supreme Court is not tenable." [*Farrar v. City of St. Louis*, 80 Mo. 379, 394; 2 Dill. Mun. Corp., sec. 752.]

Then the St. Louis charter, limiting special taxes in amount, is held to be in the nature of a special exemption from taxation to be strictly construed against the property-owner claiming the exemption, and liberally in favor of the city and contractor.

In *Allen v. Kremling*, 23 Mo. App. at 569, the court say in reference to *Zoeller v. Kellogg*, 4 Mo. App. 163:

"But it will be noticed that the court arrived at that result [that the tax was unconstitutional] by treating the assessment as being in the nature of an exercise of the right of eminent domain and not as an exercise of the taxing power," etc.

In the motion for a rehearing, p. 167, the court say:

"The power of taxation is inferred from the general grant of legislative authority. But like all general grants, it must yield whenever found in conflict with any special restriction. The restriction requiring just compensation when one's property is taken for public purposes is usually applicable, in practice, to the power of eminent domain. If, however, in a peculiar state of facts, it shall be found directly hostile to a certain exercise of the taxing power, or of any other power *the re-*

striction will be supreme and the power must so far be surrendered."

The opinion of the court on rehearing in *Zoeller v. Kellogg* must have been overlooked by the Judge rendering the opinion in *Allen v. Kremling*, 23 Mo. App. 569.

In exercising the power of eminent domain the party having the power to take usually declares such purpose to take describing the property to be taken and for what purpose and then begins court proceedings, but property may be taken in fact without such declaration of purpose and the party may deny that he takes as in *St. Louis v. Hill*, 116 Mo. 527. St. Louis did take although the city denied such taking.

In *Inhabitants of Palmyra v. Morton*, 25 Mo. 593, at 595, the argument against the local tax was by the court stated to be that it "Is obnoxious to the constitutional provision which declares that private property shall not be taken for public use without just compensation." The answer made by the court to the objection stated shows too narrow a construction of the constitutional provision quoted. The court say in answer to this objection:

"It may be observed, in the first place, that there is no attempt here to exercise the right of eminent domain, for it was not proposed to condemn the defendant's property to public use, and it is unnecessary to discuss the character, extent or limitation of that power." This evidently is intended to state that this constitutional provision applies only to condemnation proceedings. If the public take the land without a condemnation proceeding, then the public is not bound to pay just compensation. If the public are bound to pay "just compensation" only when it is proposed to condemn land to public use, then there never will be a proceeding to condemn; the state authorities will take it

without condemning it. Put this construction on the constitutional restriction in question and it will read thus: "Private property shall not be *condemned* for public use without just compensation," etc.

If this be the rule of constitutional law, then private property never will be condemned to public use. It will be taken by the public for public use without being condemned by the public and without being subjected to this burden of paying "just compensation" before getting title or disturbing the owner.

In the case of *Powers v. Hurmert*, 51 Mo. 136, the land-owner's fence was taken but it was not condemned.

In *Armstrong v. St. Louis*, 69 Mo. 311, the land-owner maintained ejectment for land embraced in the street. The owner's land was taken for a street, but it was not condemned for public use.

In *Soulard v. St. Louis*, 36 Mo. 546, the landowner sued for the value of his land taken for public use (street) and recovered. The city took the land but never condemned it. The land was taken in trespass or by wrong; the wrongdoer was sued and judgment rendered for the value of the land, and when this judgment was paid it operated to transfer by act of law the title to the land to St. Louis for public use, but it was not a condemnation proceeding.

The proper construction of constitutional provisions guarding the property rights of individuals was a subject of discussion in *Boyd v. United States*, 116 U. S. 616, et seq. (A. D. 1886). The court, by Mr. Justice Bradley, say, p. 621:

"The clauses of the Constitution, to which it is contended that these laws are repugnant, are the fourth and fifth amendments. The fourth declares, 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.' The fifth article, amongst other things, declares that no person 'Shall be compelled in any criminal case to be a witness against himself.'

"Note the language of these amendments: 'The right of the people to be secure in their . . . papers . . . against unreasonable searches and seizures shall not be violated.' What is an unreasonable search and seizure? A man shall not be compelled to be a witness against himself in a criminal case. What is a criminal case? These are the questions at issue in the case involving the constitutional validity of an act of Congress, June 22, 1874 (18 Stat. at Large 186).

"The suit was an information filed by the district attorney of the United States in the district court for the southern district of New York in July, 1884, in a case of seizure and forfeiture of property against thirty-five cases of plate glass, seized by the collector as forfeited under the revenue laws.

"It is declared by that section (12) that any owner, importer, consignee, etc., who shall, with intent to defraud the revenue, make or attempt to make, any entry of imported merchandise, by means of any fraudulent or false invoice, affidavit, letter or paper, or by means of any false statement, written or verbal, or who shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, shall for each offense be fined in any sum not exceeding \$5,000 nor less than \$50, or be imprisoned for any time not

exceeding two years or both; and in addition to such fine, such merchandise shall be forfeited.

“The charge was that the goods in question were imported into the United States to the port of New York, subject to the payment of duties; and that the owners or agents of said merchandise, or other person unknown, committed the alleged fraud, which was described in the words of the statute. The plaintiffs in error entered a claim for the goods, and pleaded that they did not become forfeited in the manner and form as alleged. On the trial of the cause it became important to show the quantity and value of the glass contained in twenty-nine cases previously imported. To do this the district attorney offered in evidence an order made by the district judge under section 5 of the same act of June 22, 1874, directing notice under the seal of the court to be given to the claimants, requiring them to produce the invoice of the twenty-nine cases. The claimants in obedience to the notice, but objecting to its validity and to the constitutionality of the law, produced the invoice; and when it was offered in evidence by the district attorney, they objected to its reception on the ground that, in a suit for forfeiture, no evidence can be compelled from the claimants themselves, and also that the statute, so far as it compels the production of evidence to be used against the claimants, is unconstitutional and void.” (S. C., page 517-8).

The evidence was received and the jury found for the United States, condemning the thirty-five cases of glass, followed by judgment of forfeiture, taken on error to the United States Circuit Court, judgment there affirmed and thence taken on error to the Supreme Court of the United States. The constitutional validity of section 5 of act June 22, 1874 (18 U. S. Stat. 186), is involved and in controversy.

Under this section *in all suits and proceedings not criminal*, the United States District attorney might file his motion stating that defendant or claimant had in his possession certain papers material to the United States in the causes provided for. The United States district attorney stated the substance of the contents of these papers and thereupon an order was made to be served on the claimant requiring him to produce the papers and permit an inspection thereof; the papers were not authorized to be seized; the claimant was simply required to produce the paper. If he failed to produce the paper the contents were taken to be as stated by the United States district attorney.

Here the claimant produced the paper under the order but objected to its being used as evidence because this fifth section was unconstitutional as being contrary to the fourth and fifth amendments to the Constitution of the United States. It was claimed to be an *unreasonable search and seizure* under the fourth amendment, and compelling a witness to give evidence against himself *in a criminal case* contrary to the fifth amendment.

Then judgment of forfeiture was sought to be sustained under the fifth section of the Act of Congress its language being, "in all suits and proceedings other than criminal." It was said that this suit to forfeit these goods was not a criminal suit or proceeding, and hence not within the terms of the fifth amendment.

Under the fourth amendment the argument for the constitutional validity of the act of Congress was that there was no search or seizure either authorized or attempted. The party was simply required to produce papers; he kept them in his possession and merely allowed United States attorney to inspect them. It was said that this law did not authorize any search or seizure and what was done was not a search or seizure. Say the court, at page 633:

“Reverting to the peculiar phraseology of this act and to the information in the present case, which is founded on it, we have to deal with an act which expressly excludes criminal proceedings from its operation (although embracing civil suits for penalties and forfeitures), and with an information not technically a criminal proceeding, and neither, therefore, within the *literal terms* of the fifth amendment to the Constitution any more than it is within the *literal terms* of the fourth. Does this relieve the proceedings or the law from being obnoxious to the prohibitions of either? We think not; we think *they are within the spirit of both.*”

This law is obnoxious to both amendments and therefore void. For the paper produced no search was authorized or made. He was simply required to produce the paper. This is the equivalent of a search and an unreasonable search. Whenever the cost of a public improvement exceeds the special benefit the sale of the abutting property to pay for it is equivalent to taking that property for public use without just compensation. The paper was produced but kept in the owner's possession. He was merely required to permit an inspection. This was not a seizure, but it was the equivalent of a seizure. The Act of Congress held unconstitutional provides that this inspection may be had in cases other than criminal and the evidence may be used in cases other than criminal. A case to forfeit goods for violation of the revenue law is not a criminal case, but it is *substantially* so. He is not giving evidence against himself in a criminal case but this is *substantially* so. The court say (S. C., page 634):

“As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the Constitution

and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are further of the opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the fifth amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the fourth amendment.

“Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that *constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be obsta principiis.*” [Have not our courts changed “Citizen” to “Contractor.”—Ess.]

“We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law.”

The above was a revenue or tax case. It was essentially a tax case. Our courts reverse the rule. "The limitation is in the nature of restriction of a pre-existing power and so far as the property-owner is concerned, an exemption from taxation, and as such to be construed strictly. Assuming that the clause could with equal reason, be construed to mean, either what the plaintiff claims, or what the defendant claims it does mean (and that is the best that can be said for the defendant's claim), and it results that the plaintiff's construction (tax-bill holder) must prevail, because as to him (the contractor), representing the municipality, the clause is a restriction of a pre-existing power, but as to the defendant (property-owner) it is the grant of a new exemption." [*Allen v. Kremling*, 23 Mo. App. 561 at 569 bottom.]

CHAPTER 5.

THEORIES OF TAXATION.

In the different states and territories of the Union and in the United States, there is no such thing as a tax by common law; it is all by statute. We construe and apply statutes. The British Constitution is no restriction on king, lords and commons. The American constitutions restrict the executive the legislative and judicial powers. That there may be no mistake about our constitutions, they are put in writing. There are two theories on which local taxation is generally supported. The first is that it is a part of the general taxing power of the government. It is not conferred by the Constitution. It is not limited by it or by the usual bill of rights in our state constitutions; that it is a legislative power; that the courts can not control it. That in the absence of special express definite constitutional limitations in terms beyond any reasonable doubt the legislative power may tax white horses and exempt all others; that they may tax land and exempt houses. They may tax it by the acre, by the front foot or according to value; they may make the tax a personal charge only or make it a lien on land or other property. They may hold the individual personally liable with all he has and all he may ever acquire without homestead or exemptions. The power to tax is the power to destroy. The power to tax exists; that the judiciary have no power to control this exercise of legislative power; that no act of legislation levying or authorizing the levy of any tax is or can be subject to "any judicial veto" on the part of any court.

The second theory is that this tax is imposed to pay for a benefit conferred on the owner's property; that the tax is therefore no burden; that this tax is special in that it is a benefit to the person and property taxed; that the tax may be equal to or less than the benefit conferred; that the tax can never exceed the benefit and that the benefit for which the tax may be levied is special, peculiar, exceptive not enjoyed in common with other like property in the vicinity. That if the property is not benefited then this taxation is confiscation contrary to all constitutional law. We shall inquire into the second ground first.

The present Constitution of Missouri took effect November 30, 1875. Look at our constitutional history. Section 19 of article 13 (Declaration of Rights, Rev. Statutes 1825, vol. I, p. 61), Constitution of Missouri, adopted July 19, 1820, is as follows:

"19. That all property subject to taxation in this State shall be taxed in proportion to its value."

Constitution of 1865, adopted April 8, 1865 (Gen. Statutes 1865, p. 24), section 30, article 1, Declaration of Rights, is thus: "shall be" is changed to "ought to be:"

"30. That all property subject to taxation ought to be taxed in proportion to its value."

In article 4, section 27, are a number of restrictions on the powers of the Legislature, among which is one prohibiting it from "exempting any property of any named person or corporation from taxation" by special act. Section 16, article 11, State Constitution 1865 (found in Gen. Statutes 1865, p. 43), is thus:

"16. No property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to the State, to counties, or to municipal corporations, within this State."

The preceding sections were thus :

"13. The credit of the State, shall not be given or loaned in aid of any person, association or corporation; nor shall the State hereafter become a stockholder in any corporation or association, except for the purpose of securing loans heretofore extended to certain railroad corporations by the State" (Const. 1865).

"14. The General Assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to any company, association, or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

"15. The General Assembly shall have no power for any purpose whatever to release the lien held by the State upon any railroad" (Const. 1865).

These sections bear somewhat on the power to tax and hence are inserted here.

I copy the whole of article 10 of the Missouri Constitution of 1875.

ARTICLE X.

"REVENUE AND TAXATION.

"Section 1. The taxing power may be exercised by the General Assembly for state purposes, and by counties and other municipal corporations, under authority granted to them by the General Assembly, for county and other corporate purposes.

"Sec. 2. The power to tax corporations and corporate property shall not be surrendered by act of the General Assembly.

"Sec. 3. Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws.

"Sec. 4. All property subject to taxation shall be taxed in proportion to its value.

"Sec. 5. All railroad corporations in this State, or doing business therein, shall be subject to taxation for state, county, school, municipal and other purposes, on the real and personal property owned or used by them, and on their gross earnings, their net earnings, their franchises and their capital stock.

"Sec. 6. The property real and personal, of the State, counties and other municipal corporations and cemeteries shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also such property real or personal as may be used exclusively for agricultural or horticultural societies; provided, that such exemptions shall be only by general law.

"Sec. 7. All laws exempting property from taxation, other than the property above enumerated, shall be void.

"Sec. 8. The state tax on property, exclusive of the tax necessary to pay the bonded debt of the State, shall not exceed twenty cents on the hundred dollars valuation; and whenever the taxable property of the State shall amount to nine hundred million dollars, the rate shall not exceed fifteen cents.

"Sec. 9. No county, city, town or other municipal corporation, nor the inhabitants thereof, nor the property therein, shall be released or discharged from their or its proportionate share of taxes to be levied for state purposes, nor shall commutation for such taxes be authorized in any form whatsoever.

“Sec. 10. The General Assembly shall not impose taxes upon counties, cities, towns or other municipal corporations; or upon the inhabitants or property thereof, for county, city, town or other municipal purposes; but may by general laws, vest in the corporate authorities thereof, the power to assess and collect taxes for such purposes.

“Sec. 11. Taxes for county, city, town and school purposes, may be levied on all subjects and objects of taxation; but the valuation of property therefor shall not exceed the valuation of the same property in such town, city or school district for state and county purposes. For county purposes the annual rate on property, in counties having six million dollars or less shall not in the aggregate, exceed fifty cents on the hundred dollars valuation; in counties having six million dollars and under ten million dollars, said rate shall not exceed forty cents on the hundred dollars valuation; in counties having ten million dollars and under thirty million dollars, said rate shall not exceed fifty cents on the hundred dollars valuation and in counties having thirty million dollars or more said rate shall not exceed thirty-five cents on the hundred dollars valuation. For city and town purposes the annual rate on property in cities and towns having thirty thousand inhabitants or more, shall not, in the aggregate exceed one hundred cents on the hundred dollars valuation; in cities and towns having less than thirty thousand and over ten thousand inhabitants, said rate shall not exceed sixty cents on the hundred dollars valuation; in cities and towns having less than ten thousand and more than one thousand inhabitants said rate shall not exceed fifty cents on the hundred dollars valuation; and in towns having one thousand inhabitants or less said rate shall not exceed twenty-five cents on the hundred dollars valuation. For school purposes, in districts, the

annual rate on property, shall not exceed forty cents on the hundred dollars valuation: Provided, the afore-said annual rates for school purposes may be increased in districts formed of cities and towns to an amount not to exceed one dollar on the hundred dollars valuation; and in other districts to an amount not to exceed sixty-five cents on the hundred dollars valuation, on the condition that a majority of the voters who are taxpayers, voting at an election to decide the question, vote for said increase. For the purpose of erecting public buildings in counties, cities or school districts, the rates of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people and two-thirds of the qualified voters of such county, city or school district voting at such election shall vote therefor. The rate herein allowed to each county shall be ascertained by the amount of taxable property therein, according to the last assessment for state and county purposes, and the rate allowed to each city or town by the number of inhabitants, according to the last census taken under the authority of the State, or the United States; said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing or bonds which may be issued in renewal of such indebtedness.

“Sec. 12. No county, city, town, township, school district or other political corporation or subdivision of the State, shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount in-

cluding existing indebtedness, in the aggregate, exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness: Provided, that with such assent any county may be allowed to become indebted to a larger amount for the erection of a court house or jail: and provided further, that any county, city, town, township, school district or other political corporation, or subdivision of the State, incurring any indebtedness, requiring the assent of the voters as aforesaid, shall before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for payment of the principal thereof, within twenty years from the time of contracting the same.

“Sec. 13. Private property shall not be taken or sold for the payment of the corporate debt of a municipal corporation.

“Sec. 14. The tax authorized by the sixth section of the ordinance adopted June sixth, one thousand eight hundred and sixty-five, is hereby abolished, and hereafter there shall be levied and collected an annual tax sufficient to pay the accruing interest upon the bonded debt of the State, and to reduce the principal thereof each year by a sum not less than two hundred and fifty thousand dollars; the proceeds of which tax shall be paid into the state treasury, and appropriated and paid out for the purposes expressed in the first and second subdivisions of section forty-three of article four of this Constitution. The funds and resources now in the state interest and state sinking funds shall be appropriated to the same purposes; and whenever said bonded debt is extinguished, or a sum sufficient therefor has been raised, the tax provided for in this section shall cease to be assessed.

“Sec. 15. All moneys now or at any time hereafter, in the state treasury, belonging to the State, shall immediately on the receipt thereof, be deposited by the treasurer to the credit of the State for the benefit of the funds to which they respectively belong, in such bank or banks as he may from time to time, with the approval of the governor and attorney-general, select, the said bank or banks giving security, satisfactory to the governor and attorney-general, for the safe-keeping and payment of such deposits, when demanded by the state treasurer on his check—such bank to pay a bonus for the use of such deposits not less than the bonus paid by other banks for similar deposits; and the same together with such interest and profits as may accrue thereon, shall be disbursed by said treasurer for the purposes of the State according to law, upon warrants drawn by the state auditor, and not otherwise.

“Sec. 16. The treasurer shall keep a separate account of the funds and the number and amount of warrants received and from whom; and shall publish in such manner as the governor may designate, quarterly statements, showing the amount of State moneys and where the same are kept or deposited.

“Sec. 17. The making of profit out of state, county city, town or school district money, or using the same for any purpose not authorized by law, shall be deemed a felony, and shall be punished as provided by law.

“Sec. 18. There shall be a state board of equalization, consisting of the governor, state auditor, state treasurer, secretary of state and attorney-general. The duty of said board shall be to adjust and equalize the valuation of real and personal property among the several counties in the State and it shall perform such other duties as are or may be prescribed by law.

“Sec. 19. No moneys shall ever be paid out of the treasury of this State, or any of the funds under its

management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have been issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

“Sec. 20. The moneys arising from any loan, debt or liability, contracted by the State, or any county, city, town, or other municipal corporation, shall be applied to the purposes for which they were obtained, or to the repayment of such debt or liability, and not otherwise.

“Sec. 21. No corporation, company or association other than those formed for benevolent, religious, scientific or educational purposes, shall be created or organized under the laws of this State, unless the persons named as corporators shall, at or before the filing of the articles of association or incorporation, pay into the state treasury fifty dollars, for the first fifty thousand dollars or less of capital stock, and a further sum of five dollars for every additional ten thousand dollars of its capital stock. And no such corporation, company or association shall increase its capital stock without first paying into the treasury five dollars for every ten thousand dollars of increase: Provided, that nothing contained in this section shall be construed to prohibit the General Assembly from levying a further tax on the franchise of such corporation.”

The work of the convention that framed the Constitution of Missouri of 1875 (our present Constitution) was completed August 2, 1875. It was adopted November 30, 1875. The 58th volume of Missouri Re-

ports was published that year. The members of the convention had the advantage of all the decisions of the Supreme Court of Missouri up to that time. And they made amendments in constitutional law, aiming doubtless to remedy defects and imperfections in constitutional law made manifest in the history, the judicial history of the State. Prior to the year 1860 the State issued bonds and took stock in railways to encourage railway building, to develop the country, its commerce and manufactures. These bonds became a heavy burden as they had to be paid from a state tax. The stock taken by the State and paid for by its bonds became worthless. The State can no longer lend its aid by issuing bonds to railroads. The Constitution of 1875 relieved from this tax for the future. Then the Legislature for a series of years authorized cities, towns, villages, counties and even townships, and strips of land not organized, to take stock in or lend their aid to railroad building and to issue their bonds to pay for such stock or as a mere encouragement to railroad building. By the Constitution of 1865 this power was limited to cases where the bonds had been voted by the taxpayers or voters. By the Constitution of 1875 no city, town, county, township or other municipal corporation can take stock in or loan its credit to any company, association or corporation. This was a limitation on the power to tax.

Article 10 of the Constitution of Missouri, framed August, 1875, adopted November 30, 1875, is a series of limitations on the power to tax by the State, by its counties, its cities, towns, villages, townships and other subdivisions of the State. It is a series of limitations on the power to tax, thus rendering more secure the right of the citizen to hold and enjoy private property.

By section 8 of article 10, the state tax (exclusive of the tax to pay bonded indebtedness of the State) per

year shall not exceed twenty cents on the hundred dollars valuation or one-fifth of one per cent, and when we reach an assessment of nine hundred millions in taxable property it shall not exceed fifteen cents on the hundred dollars valuation or three-twentieths of one per cent.

By section 10 the General Assembly can not impose taxes upon counties, cities, towns, or other municipal corporations, or upon the inhabitants thereof for county, city or other municipal purposes; the power to assess and collect such taxes must be delegated under general laws to the respective corporate authorities.

Section 11 of this article 10 of the Missouri Constitution, adopted November 30, 1875, is another and further limitation on the taxing power. It seeks to make its limitations effectual in two ways: First, by limiting the rate of taxation; and second, by prohibiting an overvaluation for tax purposes. In all cases of property taxation there must be an assessment for state and county purposes, for "All property subject to taxation shall be taxed in proportion to its value." Property assessed at a given value for state taxation can not be assessed at a greater valuation for any municipal purpose, either city, town, township, village or any other municipal purpose. The citizen is protected from any increase of taxes arising from an increase of assessed valuation while the rate remains unchanged.

The annual rates for county purposes are limited by the amount of taxable property in the county; the city rates are controlled by the number of inhabitants according to last enumeration by last United States census, or by the last authoritative state census.

The rates for county purposes are thus: In counties having a property assessed at six millions or less, fifty cents on the hundred dollars valuation; in coun-

ties having an assessed valuation of over six millions and under ten millions, forty cents; over ten millions and under thirty millions, fifty cents; and thirty millions or more, the tax must not exceed thirty-five cents on the hundred dollars valuation.

For city and town purposes the annual rate (regulated by population) shall not exceed one dollar on the hundred dollars valuation, or one per cent. In towns and cities of less than thirty thousand inhabitants and more than ten thousand inhabitants, not exceeding sixty cents; in towns of less than ten thousand and more than one thousand inhabitants, fifty cents; in towns of less than one thousand inhabitants, not exceeding twenty-five cents.

For schools, not exceeding forty cents on the hundred dollars valuation, subject to be increased to one dollar on the hundred dollars valuation in districts formed of cities and towns, and in other districts to sixty-five cents if authorized by a vote of taxpayers.

The values in all cases to be ascertained and determined by the last assessment for state and county taxes and the number of inhabitants according to the last census by the United States or under the authority of some state statute. Says this section:

“Said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing or bonds which may be issued in renewal of such indebtedness.”

Special or local taxes for local improvements made on or adjoining the property taxed are said to be not included in these restrictions and the reasons for so holding form in part the subject of this chapter. Section 18 of article 10 is a still further limitation on the power to tax. The city assessor might put a higher valuation than the county assessor on the same

property and this would increase the amount of taxes. This is guarded against by the provision that the assessment for other purposes shall not exceed that for state and county purposes. An assessor in one county may assess very low; in another county he may assess very high. A cow may be assessed in one county (e. g., where they still resist taxation to pay railway bonds), at twenty dollars; in another (where some city dominates) at two hundred dollars. If a county assessor assess too high or too low, his action may be corrected by a county board of equalization. Horses may be assessed at ten dollars in one county and at fifty in another county. Hence, this state board of equalization, to make values as near as possible alike all over the State. The rights of the citizen are endangered in two ways: First, they assess the largest possible rate; second, they make the largest possible valuation. The Constitution means that too low an assessment shall not be made to avoid a just share of the burdens of the state government, nor shall too high an assessment be made to increase both city, county and other municipal taxes to pay for what may be the wild extravagances of some city or town. It restricts city taxation. It renders property secure to that extent in the cities of the State.

But the framers of this Constitution were perfectly aware that all these limitations on the taxing power were absolutely futile unless the debt-making power be also limited; hence, section 12 of the Constitution of Missouri adopted in 1875. By that section the power of municipalities to make debts is curtailed. No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any one year the income and revenue provided for such year, with-

out the assent of two-thirds of the voters; and in cases requiring such assent, no indebtedness shall be allowed to be incurred exceeding five per cent of the taxable property according to the last assessment for state purposes, and this five per cent includes existing indebtedness.

At the time of the adoption of the Constitution of 1875, we had numerous decisions of our state Supreme Court construing various provisions of our state constitution and various statutes of the State, and defining and limiting this special, peculiar power of taxation.

Lockwood and Others v. City of St. Louis, is the first case in Missouri on local taxation.

The General Assembly of Missouri passed the following act, approved March 12, 1849, entitled "An Act to provide a general system of sewerage in the City of St. Louis:"

"Be it enacted by the General Assembly of the State of Missouri as follows:

"Section 1. The mayor and city council of St. Louis shall cause by ordinance, the city to be laid off into districts to be drained by principal and lateral or tributary sewers, having reference to a general plan of drainage by sewers for the whole city, and number and record the same.

"Section 2. Whenever a majority of the owners of real estate within any district shall petition for the construction of sewers in said district, the city council shall have power by ordinance to levy and collect a special tax on the real estate within said district so drained, not to exceed one half of one per centum per annum on the assessed value of said real estate, for the purpose of constructing said sewers, which tax shall be annually levied and collected as other city taxes, and shall constitute a lien on the real estate on which it is assessed; and shall not be repealed or altered until the debt created thereby shall have been fully paid.

“Section 3. Whenever a petition signed as aforesaid is presented to the city council, they shall provide by ordinance for the letting and construction of the sewers, or such parts thereof as shall be necessary, and may from time to time extend, enlarge or alter the same under such terms and on such conditions as they may deem necessary.

“Section 4. The mayor and city council, upon the presentation of a petition as aforesaid, may borrow any sum of money necessary for the construction of the sewers in any district, and issue the bonds of the city for the same, payable and predicated in interest and principal, upon the tax in the second section of this act mentioned.

“Section 5. All moneys collected under and by virtue of this act, shall be applied to the district from which it is so collected, and to no other purpose or use.”

Pursuant to the terms of this act, the city of St. Louis was laid off into districts for sewerage purposes, and among others was the district including within its boundaries St. George's Chapel of which Mr. Lockwood and others were trustees. Pursuant to a petition filed, the city undertook to construct and constructed the sewers in question and levied the tax of one-half of one per cent per annum. St. George's church refused to pay the tax and the church was advertised for sale by Mr. Henry Overstoltz, comptroller of St. Louis. The trustees of the church applied for and obtained a temporary injunction. The petition sets out that these special taxes for the year 1854 were levied on St. George's church for the construction of sewers in the district in which St. George's church was situated. The claim made (although not so stated in terms in the petition) was that the property being church property was by law exempt from the tax.

There were two questions before the court: First, would injunction lie? second, was the property exempt from the tax? The court held that injunction would lie on the ground that a court of equity could prevent a cloud on the title to real estate, but the court went further and held that this church property was not exempt from this tax for which the city proposed to sell it. The judgment below dissolving the temporary injunction was affirmed.

The charter of St. Louis provided that the city could levy taxes "on all property made taxable by law for state purposes" (Laws of Missouri 1850-1, p. 158, sec. 2, art. 3). Revised Statutes of 1845, page 927, section 2, provides:

"Section 2. The following subjects are exempt from taxation: . . . Tenth, churches, chapels, and other public buildings for religious worship, with their furniture and equipments, and the lands appurtenant thereto, and used therewith, so long as the same shall be used for that purpose only."

The special act of 1849, *supra*, authorizing the sewers in controversy, did not in terms exempt church property. The question was, Was it exempt from this tax and other taxes by the city charter referred to above, that charter authorizing taxation of all property "made taxable by law for state purposes?"

The court below held this church land not exempt from this sewerage tax; the court above affirmed the judgment. In rendering the judgment the court define with more or less precision the nature of this local tax:

"The words of the act imply no such exemption, and the principle on which church property is exempted from contributing to the general expenses of the government, either state or municipal, is not applicable to a special assessment of this kind. The question has been discussed and settled in other states in cases where the

claim to exemption stood under the law on perhaps stronger ground than it does here."

The same quotations are made here merely to indicate that according to constitutional law then in force and the peculiar characteristics of this local tax it was never justified unless there was a benefit equal to or greater than the tax. The statutes, the Constitution and judicial decisions (which latter became a part of the Constitution the same as if copied into it) gave it these characteristics and they had the same force as if copied into the Constitution. "But what is 'The principle on which church property is exempted from contributing to the general expenses of the government either state or municipal?'

"If an improvement is to be made, the benefit of which is local, it is but just that the property benefited should bear the burden. While the few ought not to be taxed for the benefit of the whole, the whole ought not to be taxed for the few. A single township in a county ought not to bear the whole county expenses, neither ought the whole county to be taxed for the benefit of a single township; and the same principle requires that taxation for a local object, beneficial only to a portion of a town or city, should be upon that part only. General taxation for a mere local purpose is unjust; it burdens those not benefited, and benefits those who are exempt from the burden." [24 Mo. 22.]

"To pay for opening a street in proportion to the benefit to be derived from it, was no burden and therefore no tax within the meaning of the law." This local tax always has a benefit with it equal to or greater than the tax.

In *Northern Liberties v. St. John's Church*, 13 Penn., at 107, referred to above, the court says:

"Boroughs and cities are part of the machinery through whose agency government is conducted. They

are established for the purpose of conserving the power of society and they are within the control of the government which may alter and reform their organization. Hence, they may and do lay taxes for public purposes and the public good. They maintain a police and punish offenders summarily who break the laws of the State in certain cases. This can not be done without the imposition of public taxes, which they are authorized to levy and collect. A tax was anciently defined to be a certain aid, subsidy or supply granted by the Commons of Great Britain, constituting the king's revenue (4 Inst., 216-233). As the name itself imports from its derivation, it means tribute and belonged to the king's treasury. I think that the common mind everywhere has taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and opérations; that they are imposed for a public purpose; whereas, municipal charges are often for the benefit lot-holders on a part of the street and the assessment, as in this instance, induced by the request made known according to their charter, of a majority of the inhabitants. The assessment or charge is the equivalent from the owner for the improvement made to the value of the property. Such assessments are not collectible like public taxes, but generally, as in this instance, a particular mode of recovering the charge is pointed out by the law. It is evident from all the acts of Assembly in relation to this incorporated district, that the Legislature had in view the difference between taxes properly so denominated and charges or assessments for the improvement of particular streets as the advance of population required such improvements."

This exemption law intends to exempt this church property from taxes that are burdens. This tax is for

a benefit conferred on the property. This is the judicial stamp put on this kind of tax. Other taxes are burdens and the church is relieved from them. This tax is a benefit and the church was not to be relieved from it. This decision interprets the legislative mind or intention as to what this local tax is. The property taxed is benefited to an extent equal to or greater than the amount of the tax.

"The assessment or charge is the equivalent from the owner for the improvement made to the value of the property." [13 Penn. 107, *supra*.]

Lockwood v. St. Louis was decided in 1856, nineteen years before the adoption of the present Missouri Constitution in 1875.

Newby v. Platte County was decided in 1857, eighteen years before our present Missouri Constitution was adopted. The case was tried on an agreed statement of facts. The road ran "through the plaintiff's land 122 poles and occupied one and one-half acres of land worth fifteen dollars per acre." The court continuing say, "But it was not admitted that the road was any benefit to the party" (p. 275). "As to the proper rule to compute the benefits [is this a legislative function] in cases of this character, it may not be improper, as the case is to be remanded for further proceedings, to remark that the Supreme Court of Massachusetts, in the case of *Meacham v. The Fitzhugh Railroad Company*, 4 Cushing 392 [should be 291] declared that the benefits to be charged against the adjacent landowners and deducted from the compensation to be paid to them, were the direct and peculiar benefits that would result to them in particular, and not the general benefit that they would derive in common with other landowners from the building of the road; and this seems to be substantially the principle adopted by our Legislature as just and equitable in the St. Louis im-

provement act, before referred to, and ought perhaps to be followed in the construction of this provision of the road law."

Meacham v. Fitzhugh Railroad Company has been quoted from heretofore in this paper. The tax can be equal to (and not beyond or in excess of) the special and peculiar benefit not enjoyed by the owner of the property taxed in common with other property in the vicinity. In this local taxation, to retain the condemnation money or any part of it for a general benefit, is in violation of the rule of constitutional law that "Private property shall not be taken for public use without just compensation."

"If the state government possessed no authority over private property except that of taking it for the public use upon rendering the owner a just compensation, it would seem that under this provision, the owner would be entitled to the full money value of his property without any deduction," i. e., a tax cannot be levied.

Garrett v. St. Louis, 25 Mo. 505, referred to, is a case of local taxation decided in 1857. There was no complaint of any error in the exercise of the power of eminent domain. The error complained of was in the exercise of the taxing power. Not only must there be a benefit in the exercise of this taxing power, but that benefit must be special, peculiar, exceptive.

In *Louisiana & Frankford Plank Road Company v. Pickett*, 25 Mo. 535, the statute was thus (sec. 8 of an act to authorize the formation of associations to construct plankroads and macadamized roads): After providing that the road directors or authorities shall first endeavor to agree upon the price of the land if they fail to do so then the road authorities go before a justice of the peace, who issues and causes to be served on the landowner a notice to appear before him in ten

days to show cause why commissioners shall not be appointed to fix the damages, and on the return day if the parties still fail to agree, then the justice selects a jury of five disinterested landowners (if the parties themselves can not agree on the men). This jury shall take an oath and they are bound to "faithfully and impartially assess the damages if any," and it is made their duty to "view the lands upon which damages are claimed, and they shall determine the amount of the same, *duly considering the advantages of said road to said owner*," and shall report to the justice, who enters judgment from which either party may appeal, etc.

Under the above statute, in condemnation proceedings involving, however, both the power of eminent domain and the taxing power, the court gave this instruction (25 Mo. 537):

"The jury shall go upon the land over which the road is proposed to run, and shall assess the damages sustained by said Pickett, *taking into consideration the advantages, if any, which said road may be to said Pickett*, and the jury shall make out in writing their verdict and all shall sign it, and it shall be sealed and delivered to the clerk by one of the jurors." After remarking that the constitutionality of the law had been decided in *Newby v. Platte County* the court says of this instruction:

"The instruction given by the court was erroneous in not restricting the jury to such direct and peculiar benefits or increase of value as were occasioned to that part of Pickett's land not taken for the road, and directing them to *discard from their consideration any general benefit or increase of value received by such land in common with other lands in the neighborhood*. This has been determined to be the proper construction of this and similar statutes." [25 Mo. 537.] Judge Richardson vigorously dissented on grounds directly

opposite to the reasons set out by the court in *Newby v. Platte County* and *Garrett v. St. Louis*, and cases cited in the opinions in the two cases.

In the case of the *Pacific Railroad v. Chrystal*, 25 Mo. 544, the statute was thus (Session Acts of Missouri 1849, p. 219, sec. 9): Section 9 provides that in certain events not necessary to be here mentioned the judge of the circuit court of the county where the lands are situated "Shall appoint three disinterested citizens of the county to view said lands who shall take into consideration the value of the land and *the advantages and disadvantages of the road to the same*, and shall report," etc. Judge Napton, in rendering the opinion of the court, says (p. 546):

"The order of the circuit court to the commissioners appointed to assess the damages to Chrystal's land was that said commissioners, in forming their estimate, shall make due allowance or deduction for any advantages which the said William Chrystal will derive from the said Pacific railroad, but not allowing him the benefit of any rise in land in consequence of the survey." [Here is the taxing power.]

The order of the court was not excepted to but the court took the motion to set aside the report of commissioners as in the nature of a motion in arrest, and accordingly reviewed the action of the court below in that regard. The court said:

"In the case of *Newby v. Platte County* (ante, p. 258) this court held that 'the benefits to be charged the landowners whose lands are taken for a railroad and deducted from the compensation to be allowed for the value of the land taken and the injury resulting to adjoining land, must be *the direct and peculiar benefits which result to them in particular, and not the general benefits they derive in common with other landowners in the vicinity from the building of the road.*' [Here is the taxing power.]

“The value of the land taken means its actual value independent of the location of the road. The disadvantages spoken of by the act are the injuries arising from the taking of only a part of a tract, which, from a variety of causes, may more or less impair the value of the part left, or entirely destroy its value.

“It is manifest that the order of the court to the commissioners did not conform to these principles. The report should therefore have been set aside and a second assessment made with proper instructions.”

Inhabitants of Palmyra v. Morton, 25 Mo. 593, is a case of local taxation, but even this case proceeds on the theory that these local taxes are founded on local benefits. Says Richardson, Judge (who dissents from the doctrine that the benefits must be special, peculiar, exceptive), p. 596:

“So, in towns, wells and cisterns are dug and kept in repair at the expense of particular limits; and in cities public parks and wharves are established, streets are opened and paved, sewers are made, water pipes are laid, and the expenses thereof are charged to the property-holders *benefited thereby*. It is the exercise of the same power that authorizes districts, counties or towns to subscribe for public improvements.”

“The expenses thereof are charged to the *parties benefited thereby*.” The benefit is equal to or less than the cost. Judge Richardson in his dissenting opinion in *Louisiana & Frankford Plank Road Co. v. Pickett*, 25 Mo. 535, at 538-9, admits that this particular kind of tax, this local tax, must be a benefit. He only contends for a general benefit. He denies that it is necessary to have this special, peculiar, exceptive benefit. But these expenses are charged to the parties benefited. Some persons are then benefited. They ought to be charged to an extent equal to the cost if the benefit be so great. The expenses ought to be charged to the

"*parties benefited.*" If a person then be not benefited, he ought not to be charged. He ought not to be charged to an extent in excess of his benefits. He ought not to be charged to an extent in excess of the cost.

The sovereign power ought to be so far held a trustee for the citizen as not to make a profit from public work, from him who pays for it. The citizen is helpless. He is not *liable* on any *contract* express or implied. Under the rule that this tax can not be more than the benefit, the tax is indeed not a burden. Other forms of taxation were indeed burdens and they were limited in the Constitution of 1875. The rule was expressed in two forms: First, under exemption laws, and second, under taxation laws where the tax is held to be "Not a tax on property but a tax on benefits."

The church trustees were exempt from taxes that were burdens. From taxes that were benefits they were not exempt. For the church trustees to pay for this benefit conferred "Is consistent with science and religion." The law only intends to exempt the church from a burden. This judicial interpretation of this sewer tax law, this exemption law, becomes a part of it the same as if incorporated into it. It was held to be constitutional and it was a part of the Constitution the same as if copied into it.

In *Egyptian Levee Company v. Hardin*, 27 Mo. 495, although "The defense was that the act of the legislature was unconstitutional because the land was taxed by the acre and not in proportion to its value" (p. 496), yet the special, peculiar character of a local tax is pointed out. It is founded on benefit. It is based on the fact that the impost is no burden, and *Northern Liberties v. St. John's Church*, 13 Pa. 107, is quoted from and approved (pp. 497-8), and *State v. New Orleans Navigation Co.*, 11 Mart. 309, quoted from and approved, wherein certain charges must be "Paid by

such individuals only who enjoy the advantages resulting from such labor and expense," and a like construction is given to an act of Congress requiring lands to be exempted from taxation for a number of years (five) and this act did not exempt lands bordering on the Mississippi river from a levee tax to preserve the lands and benefit them. The tax was not a burden. This tax was further defined in other judicial decisions up to the time of the adoption of the Missouri Constitution of 1875. This is specially noticeable in *City of St. Louis to use v. Allen*, 53 Mo. 44 (quoted from heretofore and not now repeated), and *McCormack v. Patchin*, 53 Mo. 33.

"The whole theory of local taxation or assessments is, that the improvements, for which they are levied, afford a remuneration in the way of benefits. A law which would attempt to make one person or a given number of persons, under the guise of local assessments, pay a general revenue for the public at large, would not be an exercise of the taxing power, but an act of confiscation. In effect, it would be transferring the property of one individual to another. These are legal truisms which have long been entertained and firmly established" (p. 36).

These decisions in 53 Mo. were rendered in 1873, just two years before the Constitution of 1875 was framed. These cases were then published and were known to the members of the convention. Washington Adams was a member of the court then. The people of the State desired him to resign his position on the Supreme Court and to become a member of the convention to carry out his ideas of constitutional law as to the safety of private property from being damaged for public use without just compensation.

Thurston v. St. Joseph, 51 Mo. 510, was decided in 1873. The idea that this local tax is for a benefit con-

ferred on the property taxed and in no case can exceed the benefit is illustrated in *Farrar et al. v. The City of St. Louis*, 80 Mo. 379, *et seq.*

Article 10 has been quoted in full on preceding pages. The case *supra* is one on local taxation. After quoting sections of article 10, the court, on p. 386, *et seq.*, say:

"If, as contended for by plaintiff's counsel, the 'taxes' and 'taxation' referred to in the above sections, embrace and were intended to embrace, special assessments made to pay for local improvements, then it would follow that the said charter provisions of the city, as well as ordinance No. 12041, the validity of which is questioned in this suit, would fall because of conflict with the Constitution. But we are of the opinion that charges for the cost of a local improvement against the property *benefited by the improvement*, although an exercise of the taxing power, are not such taxes as are referred to in the various clauses of the Constitution above quoted, and that they are neither embraced, nor intended to be embraced in them. [What are the reasons for omission is in part the purpose of this chapter.] Said article 10 of the Constitution is devoted to 'Revenue and taxation,' and the taxation there provided for and restricted relates to such taxation as is intended to raise revenue to be paid into the respective treasuries of the State, county or municipality, and to be disbursed therefrom for state, county or municipal purposes. At the time the Constitution of 1875 was being framed, the validity of special assessments for the payment of the cost of local improvements had been sustained in numerous rulings of this court, *the principle underlying these adjudications being that the property benefited by a local improvement was increased in value as much as it is required to pay for the improvement.* These rulings were made under

the constitutions of 1820 and 1865, both of which contained the same provision that is contained in section 4 of the present Constitution, viz.: 'That all property subject to taxation, shall be taxed in proportion to its value.' "

The cases in the Supreme Court were then reviewed. The first case reviewed is that of *Lockwood et al. v. St. Louis*, 24 Mo. 20, where the property was taxed for a sewer one-half of one per cent of its value in precise accordance with the constitutional provision quoted, "That all property subject to taxation shall be taxed in proportion to its value." The case is referred to as illustrating the difference between a general tax and a local tax. A general tax is a burden, whereas a local tax is a benefit. The cases of *Newby v. Platte County* and *Garrett v. St. Louis* are referred to wherein the doctrine is established, not only that there must be a benefit but that a general benefit will not suffice; the benefit must be special, peculiar, exceptive, not enjoyed by the landowner in common with his neighbors about him. Otherwise this taxation law takes private property for public use without just compensation. Continuing the court says, p. 390:

"It was well known to the members of the convention who framed the Constitution of 1875 that according to the rulings of this court the words 'Taxes' and 'Taxation' as used in sections of the constitutions of 1820 and 1865, identical with said section 4, did not embrace special assessments or taxes imposed to pay for local improvements for *benefits thereby conferred on the property assessed or taxed*; and if they intended to change the rule of interpretation in this respect, and embrace special assessments in the restrictions contained in said section 11, apt words expressive of such intention and accomplishing such object would doubtless have been used. No such words were used, nor are

they necessarily implied from the expression contained in said section, that 'Said restrictions as to rates shall apply to taxes of every kind and description,' for in the case of *Sheehan v. The Good Samaritan Hospital*, 50 Mo. 155, where by statute, the property of the hospital was expressly 'Exempt from taxation of every kind,' it was held that the property was liable to a special assessment against it for the improvement of a street on its front, notwithstanding by statute it was exempt from taxation of 'every kind,' the court holding that the taxation from which it was exempted was for the ordinary taxes for the purpose of revenue, and that the tax-bill sued on is not regarded as a tax, but as an assessment for improvements, and is not considered a burden, but as an equivalent or compensation for the enhanced value which the property derives from the improvement."

Says Judge Adams in rendering the unanimous opinion of the Supreme Court in *State ex rel. Chouteau et al. v. Leffingwell et al.*, 54 Mo. 458, at 474 (A. D. 1873): "*Local assessments are constitutional only when imposed to pay for local improvements conferring special benefits.*" Hence, there was no necessity to change the Constitution in this respect.

The local assessment for work conferring no special benefit is unconstitutional (it was in 1873) because it takes private property for public use without just compensation. This appears in the unanimous opinion of the court. Judge Adams was a member of the constitutional convention; so was Judge Norton who wrote the opinion in *Farrar v. St. Louis*, quoted from above. Judge Black was a member of that convention. It embraced the ablest jurists of the State. I forbear to name all of them whose names are attached to the Constitution of 1875, in Revised Statutes of Missouri of 1879, vol. 1, pp. xci, xcii and xciii; Revised Statutes of

Missouri 1889, vol. 1, pp. 112-3-4; Revised Statutes of Missouri 1899, vol. 1, pp. 120-1.

Article 10 of the Missouri Constitution of 1875 introduces a series of reforms in taxation. The state tax is twenty cents on the one hundred dollars valuation. This is one-fifth of one per cent. There was no limit before, and hence the tax might have been one hundred per cent. Is it possible that the convention would limit the state tax to one-fifth of one per cent for all the purposes of the state government, and yet in any city, town or village one hundred per cent or five hundred times as much might be levied to build a sidewalk or curb a street or pave it, and that, too, without any benefit whatever and against the owner's will? Did the convention consider when they proposed this constitution—did the people of this State when they adopted that constitution consider or suppose that there was no limit to special taxes, or did they both consider that special taxes were already limited by that provision of the state Constitution, that "Private property shall not be taken or applied to public use without just compensation"—that local taxes were constitutional only when imposed to pay for public improvements conferring special, peculiar, exceptive benefits? They even changed, in the interest of the property-owner, this provision by enacting that private property shall neither be taken nor damaged for public use without just compensation. And for either they adopted the rule, "Cash in advance."

The burdens of taxation are lessened—made uniform by section 2, article 10. An assessment made for state purposes can not be exceeded by any city, town or village assessment. It may be less; it never can be more. The county tax must not exceed fifty cents on the hundred dollars valuation or one-half of one per cent per annum. The largest municipal tax is one per

cent; the smallest is for villages, one-fourth of one per cent. While the rate remains constant, the amount of municipal tax can not be increased by a larger assessment. Everywhere is a limitation of the amount of tax.

Did the convention by proposing this Constitution, did the people of the State of Missouri by adopting it, intend that the whole state tax should be only one-fifth of one per cent for conducting the state government; the whole county tax for conducting the county government should be one-half of one per cent, only making a total tax of not to exceed seven-tenths of one per cent for the state and county government and yet in any city, town or village, one hundred per cent (one hundred and forty-three times as much as for both) might be levied for a sidewalk or for paving or for a sewer (perhaps in a cow pasture) when the work adds nothing to the value of the land or is in excess of the value of the land?

Said one member of this convention in rendering the unanimous opinion of the Supreme Court of Missouri in *State ex rel. v. Leffingwell*, 54 Mo. 457, loc. cit. 474 (two years before the convention met): "Local assessments are constitutional only when imposed to pay for local improvements *conferring special benefits*."

Why make a change? Up to the time of the adoption of the Constitution of 1875 there never had been a decision of any court in the State (of which this writer is aware) upholding the constitutional validity of a local tax imposed on local property not benefited. In the earlier cases under the Constitution of 1820 there was absolutely no difference of opinion. The minority of the court held that a general benefit was sufficient. But a benefit was necessary. Indeed the tax was characterized as "a tax on benefits." The very language implies that there must be "Benefits" to be taxed. A

tax on property implies that there is property to be taxed, the tax law can not create the property nor can it create the benefit. The tax law can not determine that the citizen has property nor can it determine that he has benefits.

Take the case of *Zoeller v. Kellogg*, 4 Mo. App. 163. The judges there held the tax-bill unconstitutional, but the case was subsequently overruled, and I treat the case as holding that the tax-bill was constitutionally valid, as the judge who rendered the opinion concurred in overruling it. Let us compare. In that case, according to the finding of the court, the lot was worth, after all the improvement was put in with all the value thereby added to the land, \$1,025. The tax-bills in judgment were \$1,688. Here was a tax of one hundred and sixty-three per cent on the benefited land with all accrued benefits added. We are not informed what this \$1,025 land was worth before it received this \$1,688 benefit. If we assume it to have been quadrupled in value, then it must have been worth in round numbers \$250; and for this \$775 benefit, the owner must have paid \$1,688 and costs, or lose his \$250 property. The decision as rendered below was reversed, but it ought, according to subsequent decisions, to have sustained the tax-bills. In the Missouri Constitution of 1875 state taxes to carry on the state government were limited to twenty cents on the \$100 valuation, or one-fifth of one per cent. The tax on the St. Louis lot was 815 times as much. The Missouri Constitution of 1875 provided that when the taxable property of the State should reach \$900,000,000, then the state tax should be fifteen cents on the \$100 valuation, or three-twentieths of one per cent. This special tax would have paid all state taxes at this rate for 1,087 years. This special tax is 1,087 times as much as it takes now to run the state government. Think of it! This local tax in 1873 on

this St. Louis lot would (if this judgment had been paid) pay all the state taxes on that lot to support the state government for eight hundred and fifteen years and with our larger assessment it would pay all state taxes for 1,087 years. If the assessment had been made for state taxes at forty per cent of the actual value for taxation, then this local tax on this St. Louis property in judgment in 1877 would have paid all state taxes on this lot for 2,037 years, and when the state tax was reduced to fifteen cents on the \$100 valuation, would have paid all state taxes for 2,717 years. Think of this, gentle reader. This one local tax on this St. Louis lot would have paid all the state tax on that lot from June 12, 1877, to June 12, A. D. 4594. It would pay all state taxes back to 100 years before Romulus founded Rome—750 years before the crucifixion of Christ—700 years before the Augustan Age of Rome. If we estimate the property worth \$250 before the improvement, and assess it for taxes at forty per cent of its value, then we have \$100 valuation for taxes and the state tax will be fifteen cents on the \$100 valuation. This local tax of \$1,688 would pay all state taxes on this lot eleven thousand two hundred and fifty-three years. That would pay all state taxes back 5,200 years before the time of Adam and Eve in the Garden of Eden. It would pay all state taxes from the decision on June 12, 1877, up to June 12, A. D. 13130.

And if there is any one thing settled in American constitutional law it is this viz.: This local tax in one year that would pay all state taxes for eleven thousand two hundred and fifty-three years "*is not a burden.*" That one year's state tax is a burden.

By accident we have this comparison in this reported case. Many cases occur where the tax-bill is sufficient in amount to pay the state taxes back to the time of Adam and Eve in the Garden of Eden, and

many are pre-Adamites. The Constitution allowed a debt to be created not exceeding five per cent of the taxable property. At full value this real estate was worth \$1,000. Its share of the largest possible debt would be \$50. This tax-bill is thirty-four times that amount. If the assessed value were forty per cent of the real value, the tax would be \$20 as its share of the largest possible debt to be contracted. This judgment is eighty-four times that amount. The highest school debt allowable is one per cent. This tax-bill judgment will pay school taxes for 422 years. The highest county tax is one-half of one per cent. This tax-bill judgment will pay county taxes for 844 years. The highest city tax allowable is one per cent. This tax-bill will pay city taxes (for general purposes) for 422 years.

In *Zoeller v. Kellogg*, 4 Mo. App. 163, the land was of an actual value of \$1,025. The judgment was for \$1,688. This was one hundred and sixty-three per cent only. The total assessed value of all the property of the State now is nine hundred millions of dollars. Now, levy a road tax at the same rate on all the property, real, personal and mixed, in the State and you will absorb all the property in the State and be short five hundred and sixty-seven millions of dollars; i. e., the whole property of the State is absorbed and there is lacking five hundred and sixty-seven millions of dollars to pay the contractor. Now the people of the State lose all they have, but you must remember that this is no burden; it was not to the St. Louis lot, and the same rate to the whole State would be no burden. Some might object, but they would doubtless be very few and they would be opposed to public-improvements any way, but the chief concern of this writer is what is to become of this poor contractor who is five hundred and sixty-seven millions short in pay on his job. I am really apprehensive it will break him up. Like Alex-

ander the Great, he must weep because there is nothing more to tax.

As this writer now views the subject, nothing possible can relieve him from this disastrous loss except an Act of Congress to apportion this five hundred and sixty-seven millions on the abutting land to the extent of 250 miles in depth in the adjoining states for the benefited property ought to pay the cost. (*Zoeller v. Kellogg*, ought not to have been overruled.)

A similar tax on all the states would absorb the whole property of the whole country and fall short about thirty thousand millions. This is four times as much as all the coined money of the world. But this tax is really different from the ordinary tax to support the government, for this particular tax is *no burden*. As a matter of idle curiosity, this writer would like to know what would be a burden. Our tax-bills draw ten per cent interest. This ten per cent on this thirty thousand millions is only three thousand millions per year. This looks like a very large sum of money to be in default each year, but still those benefited ought to pay it. But you must have indelibly fixed in your mind this constitutional truth: this tax is no burden like the state tax of fifteen cents on the hundred dollars valuation. A somewhat similar difficulty presented itself March, 1905, to the thirteen freeholders framing a new charter for Kansas City.

It is said cases are frequently met with where the corner lot, being only twenty-five feet in width, is not enough in value to pay the tax-bill for the improvements on the adjoining street. The proposal was to extend the tax-bill lien to the center of the block. The abutting property is frequently not worth enough to pay the tax-bill. This has seriously affected the market for tax-bills. Before tax-bills can be sold in the market now, the proposed purchaser examines the

property on which the tax-bill is a lien. If it be vacant property the tax-bills may be rejected in the market. The property may not be worth the tax-bills. The improved corners must make up the deficiency for the vacant corners. Take the four corner lots on any street—lots 25 feet by 150 feet. Each lot will have a tax of \$875 for paving (150 feet plus 25 feet); \$175 for sidewalk (175 feet at \$1); curbing \$85; sewer \$50; trees \$15; total \$1200—\$48 per front foot, or \$8 per front foot the short way (25 feet deep). This is thirty-two cents per square foot or \$7.68 for our graves, four feet by six, into which we are forced by this tax which is *not a burden*. Corner lots can not be sold at that price. This allows nothing for the original lot. If the original lot was worth \$48 per foot, then here is a tax of one hundred per cent, making the value of the lot \$96 per front foot. But this tax is no burden. If the lot was worth before the improvement \$24 per front foot, then here is a tax of two hundred per cent, and the lot is worth \$72 per front foot. If the lot is worth (unimproved I mean) \$12 per front foot, then the tax is four hundred per cent and the lot must sell for \$60 per front foot. If the lot is worth \$2 per front foot, then the tax is twenty-four hundred per cent and the lot is worth \$50 per front foot.

This tax of twenty-four hundred per cent is no burden. The Constitution prohibited the creation of a debt exceeding five per cent for ordinary public expenditures. More than five per cent is a burden for general taxes but twenty-four hundred per cent for a street improvement is not a burden. The cost of the improvement was \$1,200. If we count the lot then worth \$600, then the contractor loses \$600 by taking a six hundred dollar lot in payment of a \$1,200 tax-bill. The lot then was originally worth in cool cash \$600 below zero. That is, this lotowner must find some one and then make a

deed of this lot to him and give him six hundred dollars in cash, and then that grantee of the lot, holding the cash and lot, is worth exactly zero. "*Cujus est solum ejus est usque ad coelum et ad orcum.*" It certainly must be admitted that some of our real estate is high in the air, but the most sincere advocate for public improvements will readily admit that, owing to excessive taxes, all our real estate has gone "*ad orcum*" (to hell) at least in price. "Silks and satins have put out the kitchen fire." Here is reckless extravagance and consequent ruin.

The freeholders proposed for the new charter of Kansas City that the corner lot should be relieved of a portion of this burden. They proposed to make the lien (on the lot 25 feet wide) less to such an extent that the tax-bill should not exceed one hundred per cent of the lot including the improved value. It was proposed to extend the lien to the middle of the block because the corner lot is not worth enough to pay the tax-bill. Those keeping up with the market on tax-bills have found many tax-bills that exceed in amount the real value of the land on which they are liens. These tax-bills must be made good in the market. Hence, the proposal to lighten the burden on the corner and increase the burden on the inside lot. The result is liable to be that the tax-bill on the inside lot will be greater than its value, so that owners will lose both inside and corner lots. The thoughtful owners of inside lots hope (not in vain) to hold their inside lots and let the corners go or abandon the lots to the holders of the tax-bills. If the charter can authorize a lien one foot beyond abutting property, it can for a mile or even to the Kaw river on the west or the Mississippi on the east and to the Rocky mountains on the west. Rather than allow the contractor to lose money, it would be better to extend it from ocean to ocean and from the arctic circle to the equator.

The Mississippi river and the Rocky mountains ought not to be "*the ultima thule*" of this lien. Such narrow confines for this lien is frequently productive of great injustice. Mrs. Smith's lot (128 Mo. 23, et seq.) was damaged \$2,750. You can not find a single lot in Portland, Oregon, or in San Francisco, California, or anywhere on the Pacific Coast, that was damaged \$2,750, but they issued a tax-bill against Mrs. Smith's lot for doing this damage and she had to pay it (67 Mo. App. 205, et seq.). These statements may seem to be exaggerations, but a brief glance at the facts admitted on all sides will convince any one that the statements are correct. It is true Mrs. Smith secured judgment for \$2,750, and the judgment was paid; her personal attendance in court was necessary. Mrs. Smith had to employ and pay a lawyer. She got nothing for that. She had to follow the case to the Supreme Court of Missouri. While the lotholder in Portland or San Francisco was not benefited in fact, he certainly was not damaged to the extent of \$2,750. He had none of the annoyances of a troublesome, vexatious lawsuit to recover \$2,750 damages caused by a \$300 benefit.

The Tea tax of the Revolution did not damage a single citizen of all the Colony of Massachusetts Bay to half this extent.

The Constitution of Missouri of 1875, article 10, made important changes. It made no change except where the necessity was apparent and urgent. The State had loaned its credit to various railway enterprises. The adventures had been disastrous financially, and in 1865, under article 11, section 13, the Legislature could no longer lend its aid to any corporation or persons. The restriction was re-enacted in 1875. Counties, cities, towns, villages, townships and even unorganized strips of land, took stock in railways and otherwise aided railways in developing the country. This

proved disastrous and the power was modified in 1865 in the Constitution so as to require a vote of the taxpayers or voters at an election for that purpose. These restrictions proved to be of no avail and in the Constitution of 1875 all power was taken away from the Legislature.

The Constitution of New York contained this provision (*People v. Mayor of Brooklyn*, 4 New York 419, 55 Am. Dec. 266, at 284): "It shall be the duty of the Legislature to provide for the organization of cities and incorporated villages, and to restrict their powers of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and in contracting debt by such municipal corporations."

"The direction given to restrict the power of cities and villages to make assessments, presupposes and admits the existence of a power to be restricted." [S. C. in 55 Am. Dec., p. 284.]

And the provisions of the Constitution of New York, first, that private property shall not be taken for public use without just compensation, and second, that no person shall be deprived of life, liberty or property without due process of law, are not intended to nullify this special provision on this special subject in the same Constitution. Say the framers of the Constitution of New York: "We will not undertake—we do not undertake to restrict you in taxation, assessments, borrowing money, contracting debts and loaning your credit or that of cities, towns and villages. Your Legislature must make these restrictions."

The Constitution does not act on the subject. It authorizes the Legislature to act. It is said that there are no restraints on local taxation in article 10 of the Constitution. This is true. The members of the convention knew of local taxation and made no effort to re-

strict it or prohibit it. It always was limited to the special benefit. The old constitution contained the provision that "Private property shall not be taken or applied to public use without just compensation."

"Local assessments are constitutional only when imposed to pay for local improvements conferring special benefits" (Oct. A. D. 1873, 54 Mo. at 474). Why make a change?

Locust street in Kansas City was graded and Mrs. Smith's adjoining lot was damaged thereby to the extent of \$2,750. There was a local assessment of \$300 to pay for doing this damage assessed against the damaged property. If this assessment had been before the Supreme Court of Missouri in 1872 or 1873 or 1874 would it have been held constitutional by the court? Was a local tax then constitutional which created a damage ten times as great in amount as the tax?

"There is a broad distinction, and one of universal recognition, between the foundations upon which is based the right of general taxation for governmental purposes and that which supports the rights of local assessments. The authority to impose either is referred to the taxing power; but the object of one, as giving the authority, widely differs from that of the other.

"All taxation is supposed to be for the benefit of the person taxed. That for raising a general revenue is imposed primarily for his protection as a member of society, both in his person and property in general, and hence the amount assessed is against him, to be charged upon his property, and may be collected of him personally. But on the other hand, local taxes for local improvements are merely assessments upon the property benefited by such improvements, and to pay for the benefits which they are supposed to confer; the lots are increased in value, or better adapted to the uses of town lots, by the improvement. *Upon no other ground*

will such partial taxation stand. Other property held by the owner is affected by this improvement precisely and only as is the property of all other members of the community, and there is no reason why it should be made to contribute, that does not equally apply to that of all others.

“The sole object, then, of a local tax being to benefit local property, it should be a charge upon that property only, and not a general one upon the owner. The latter, indeed, is not what is understood by a local or special assessment but the very term would confine it to the property in the locality; if the owner be personally liable, it is not only a local assessment, but also a general one as against the owner. The reasonableness of this restriction will appear when we reflect that there is no call for a general execution until the property charged is exhausted. If that is all sold to pay the assessment, leaving a balance to be collected otherwise, we should have the legal anomaly—the monstrous injustice— of not only absorbing the property supposed to be benefited and rendered more valuable by the improvement, but also of entailing on the owner the loss of his other property” (50 Mo. 528-9).

This was the language of the Supreme Court of Missouri in 1872, just three years before the convention met to frame the Constitution of 1875. Wash Adams was then a member of the Supreme Court, and he was a member of the Constitutional Convention, having resigned his place on the Supreme Bench to become a member of the Constitutional Convention.

Under the Constitution of 1820 and of 1865, local taxation in Missouri could only exist where there were local benefits. Not only must there be benefits but those benefits must be special, peculiar, not enjoyed in common with other property in the vicinity. Taxation of this character amounts to “Taking private property

for public use without 'just compensation,' " in every case where this special benefit did not exist. Judge Richardson's idea that a general benefit was sufficient was overruled "*upon no other ground (than benefits) will such partial taxation for a moment stand.*" At the time the city of Weston, under authority of her charter, levied a tax of one-half of one per cent on the lands of Mr. Wells, situated without the city limits and within one-half mile of the city limits, the Legislature had no authority to tax. The Missouri Constitution did not direct the Legislature to limit their power to tax lands without the city limits and within one-half mile of the city limits. The power was prohibited.

In Missouri this power was prohibited to all the departments of the state government. In place of being prohibited to the New York Legislature, the power was given in express words.

In the matter of the license tax on wagons hauling goods or property from points without to points within the city, the Constitution of Missouri did not direct the Legislature to restrict the powers of the city of St. Charles in levying such taxes. In place of delegating such power by a clause therein giving the Legislature full power, the Constitution left it where it was here, and where it would have been in New York, but for the peculiar phraseology of the New York Constitution. It was taking private property for public use without just compensation, and that clause was not modified in Missouri as in New York. The people of any State may adopt a constitution without a clause prohibiting the State or any one acting for it or by authority granted by it from taking private property for public use without just compensation. The constitution of any State may provide that the Legislature of the State in the way of a local tax may take private property for public use without just compensation, but shall not do so

in any other case. They may in terms give their legislatures the power to take private property for public use in all cases or in a limited number or character of cases without just compensation or any compensation.

The construction put on the state constitution by the highest judicial tribunal of the State becomes a part of that constitution the same as if copied into it. The Supreme Court of Missouri for a number of years put a construction on the clause of the state constitution providing that "Private property shall not be taken for public use without just compensation." That construction was that a local tax put on abutting property to pay for improvements in front of or adjoining it where the property does not receive a special, peculiar, exceptive benefit, a benefit not enjoyed by other property in the neighborhood, is a taking of private property for public use without just compensation, contrary to the Constitution of the State.

The new Constitution provided that not only should private property not be taken for public use without just compensation, but that it should not be damaged, thus adding an additional security for private property.

A moment's reflection will convince even the most skeptical that if local taxes can be levied without special benefits equal to or greater than the tax, then the express rule of constitutional law that private property shall not be taken for public use without just compensation is abolished; for in every case this "just compensation" after having been ascertained in a proper judicial proceeding may be taxed one hundred per cent to pay the owner, and there is no difference in retaining the whole of this "just compensation" on the one hand, and selling adjoining land to pay it on the other hand. If the land be not benefited, the owner loses his land and gets nothing for it, or loses his money and

gets nothing for it. The purchaser gets the land; the former owner can not get it from him; the public gets the money and the landowner can not get it from the public. This local tax, in order to be enforced, must be a benefit to the property taxed; or, more properly speaking, the work for which the special tax is levied must be a benefit to the property taxed and that benefit must be special, peculiar, exceptive—a general benefit is not sufficient; any other other local tax was unconstitutional in taking private property for public use without “just compensation.”

These judicial decisions became a part of the Constitution, and the Constitutional Convention of 1875 in proposing this constitution, and the people of the State of Missouri in adopting it with the same language as contained in the previous constitutions, adopted it with the same construction put on it by the courts.

This is the rule applicable to statutes adopted from other states or countries by this State, or continued or re-enacted in this State. The rule should hold good for the different sections and clauses in the state Constitution.

Again, what is expressed in a state constitution (e. g., “private property shall not be taken or damaged for public use without just compensation) ought to control that which is implied (the unlimited power to tax for doing an act which the Constitution prohibits).

“The rule of constitutional law being that private property can not be taken for public use by the authority of the Legislature without a just compensation, it follows that what is to be considered as compensation within the meaning of this clause is a question of law for the courts and not a matter for the Legislature; and under such a constitution as we have supposed, with no other power over private property than that of taking it for the public use upon making the owner a

just compensation, it would be quite beyond the scope of the legislative authority to declare that the benefit derived by the landowner from the road is the just compensation secured by the Constitution." [*Newby v. Platte County*, 25 Mo. 258, at 263, near the bottom (A. D. 1857).]

The case of the *North Missouri Railroad Company v. Lackland*, 25 Mo. 515, et seq., holds likewise that the proceeding in condemnation cases is a judicial proceeding. The section of the Constitution demands a judicial proceeding, for this just compensation must be ascertained by a jury or board of commissioners. A jury is peculiar to a court of law in judicial proceedings. A jury is wholly unknown in legislative proceedings. In this case the railroad company filed its suit to condemn a house and lot in St. Charles, Missouri, for a part of its right of way. The commissioners were appointed and on viewing the premises they assessed the just compensation at \$4,200. They filed their report on September 24, 1855. The railroad filed no exceptions. At the next term the railroad company asked that the case be dismissed, which was done. Defendant at the same term moved the court to set aside the dismissal and the motion was sustained. Plaintiff moved for judgment on the report and the motion was sustained and judgment entered accordingly and the railroad company appealed. Would an appeal lie? The question was whether this was a judicial proceeding. Did the court act as a court? The Supreme Court, at page 526, say:

"That there may be cases where special and limited authority is delegated to a court, not because it is a court, but from some idea of convenience or propriety and the decision of the court be made final, is not questioned. It may, however, admit of a doubt whether the Legislature could so devise a proceeding designed to

effect the transfer of private property to the public, so as to deprive the courts of the power of determining whether the constitutional restrictions upon this subject had been honestly complied with. However this may be, the question here is, does the court act in its judicial capacity, and can it exercise, in its control over the subject confided to it by the charter, the general powers and jurisdiction of a court, or is the court, *quo ad hoc*, a mere commissioner, a special tribunal selected for a special purpose and *functus officio* when the special powers confided to it by statute have been exhausted." After some observations as to the statutes the court say, p. 527:

"There are some provisions in this section which undoubtedly might be construed to limit the power of the judge, as a mere commissioner, to the specific acts delegated; but in the main the general scope of the section looks to the action of the court in its judicial capacity, and gives the court authority, not only to pronounce a judgment which will pass a title to the land to the company and a right to the damages to the landowner, but 'To make all orders and take any steps' which in the opinion of the court will best promote the ends of justice. Although the act is carelessly drawn, and framed in a mode to justify doubts as to its true intent, we will not presume, notwithstanding the absence of any special provisions for an appeal, that it was the intention of the Legislature to deprive the parties interested of this right; especially as the provisions of the general law, both of 1849 and 1845, seem large enough, without any strained construction, to embrace the case. We are the more inclined to this opinion, because an appeal is the most convenient and least expensive mode in which the supervising jurisdiction of this court can be exercised, and because it may be safely said that it is at least doubtful whether that jur-

isdiction could be entirely cut off if the Legislature had so intended. Could the Legislature provide an illusory compensation for private property taken for public use, totally at variance with the true spirit of the Constitution, and by placing its enforcement under the control of a selected tribunal and declaring the decisions of that tribunal final, thus place the subject beyond the reach of the courts?"

The legislative department of every city, town and village is just such a tribunal now. It would seem that the question what is "just compensation" for property taken for public use is a judicial question and if a property-owner may be paid in benefits as well as in cash—if "just compensation" may be made in benefits as well as cash—then what is a benefit and how much, are judicial questions for the courts.

"But it was not admitted that the road was any benefit to the party, and the court, we think, could not infer this as a matter of law from the agreed facts and pronounce against allowing the plaintiff any compensation for the property of which he was deprived." [*Newby v. Platte County*, 25 Mo. 258, at 275.]

Continuing in the same case the court say:

"As to the proper rule by which to compute the benefits in cases of this character, it may not be improper, as the case is to be remanded for further proceedings, to remark," etc., etc., about the rule in Massachusetts that special, peculiar, exceptive benefits alone can be considered. Here the court computes benefits and ascertains and determines the fact and amount of benefits.

The court can not do this if the question be properly a legislative question. The courts have no legislative powers. The Legislature has no judicial powers. This is American constitutional law.

“The council does not nor can it assess damages or benefits.” [*Baird v. Kansas City*, 98 Mo. 215, l. c. 221 (A. D. 1889).]

CHAPTER 6.

POWER OF TAXATION A PART OF SOVEREIGNTY.

We have seen in the preceding chapters that benefit is the foundation of the power of local taxation. Without such benefit local taxation is confiscation. We have seen that the benefit must be special, peculiar, exceptive, not enjoyed in common with the owners of property in the neighborhood or vicinity. We have seen that a tax law which allows general advantages to be set off against "the just compensation" for land taken for public use, is an infringement of the rule of constitutional law which provides that "Private property shall not be taken for public use without just compensation." We have seen that any tax law which, in place of deducting a sum of money from this just compensation, places it as a charge or lien on adjoining land when that land does not receive this special, peculiar, exceptive benefit, is likewise an infringement of the same rule of constitutional law. We have seen that in the early establishment of this rule of constitutional law, its opponents admitted that a benefit was necessary and without a benefit there could be no tax. The only point of difference was that a general benefit was thought to be sufficient, and this was overruled.

We have seen (25 Mo. 258, at 263) that "if the state government possessed no authority over private property except that of taking it for public use, upon rendering the owner a just compensation, it would seem that, under this provision, the owner would be entitled to the full money value of his property without any deduction." We have seen that deducting any portion of this just compensation, or placing it as a charge or lien

on adjoining land, is an exercise of the taxing power in each case (25 Mo. 505, at 514). We have seen under the principles announced in *Zoeller v. Kellogg*, 4 Mo. App. 163, before it was overruled, that under local taxation private property can no more be taken for public use without just compensation than in the exercise of any other governmental power. The restrictions for the security of private property applied to all branches of the government, legislative, executive and judicial. We come now to the other theory of taxation, and it has very weighty reasons in its support.

The power of taxation exists in the State without being conferred by the people of the State or by the Constitution. The power is a part of sovereignty; it is inseparable from it. Let us return to a period prior to 1875, in the constitutional history of Missouri. We had then a constitutional provision that all property subject to taxation shall be taxed in proportion to its value. There was no other restraint in terms in the Constitution. Hence, it is said the Legislature may tax one hundred per cent. The constitutional requirement that all property subject to taxation shall be taxed in proportion to its value is complied with if a tax of one hundred per cent is levied, and the tax is valid if it is not in contravention of some other provision of the Constitution. The city of Weston levied a tax of one-half of one per cent on all land without the city limits and within a half mile thereof. This was a general tax. This was in form authorized by the charter of Weston. It was not invalid; it was not claimed to be invalid by reason of coming in conflict with the only express limitation in the Constitution on the subject of taxation; the property if validly taxed at all was taxed according to value in precise compliance with this express limitation on the taxing power, and yet the tax was invalid by reason of the fact that the statute authorizing

it was in conflict with an implied provision of the Constitution that private property cannot be taken for private use. The statute took Wells' private property and gave it to the people living in Weston for their private use. The fact that Wells' land was enhanced in value by reason of its proximity to Weston, by reason of the fact that a market was brought to his door, was not considered by the court. The benefit was of no more force than if a mill had been erected by Mr. Wells' neighbors (many or few). Mr. Wells' land could not for that reason be taken from him in whole or in part, as suggested by Judge Tucker in *James River and Kanawha Company v. Turner*, 9 Leigh 313.

Mr. Wells' land cannot be taken; he cannot be taxed "For having a market and other conveniences brought to his door" (25 Mo. 539, Richardson, Judge, dissenting opinion).

It seems Mr. Wells was "entitled to gratuitously receive such advantages." It was "well settled that the exercise of the power to assess and collect the public burdens should not be purely arbitrary and unregulated." The Constitution of Missouri as then interpreted, regulated the Weston tax by holding it void and prohibited. If the Constitution did not "regulate" this tax, what did?

The power to tax is the power to destroy. If the Legislature thus has the power to destroy by taxation and are proceeding to destroy by taxation, how are the courts to regulate that legislative action? If the Legislature enact a law prohibited by the Constitution then that law is invalid.

"The power of taxation is inferred from the general grant of legislative authority. But, like all general grants, it must yield whenever found in conflict with any special restriction. The restriction requiring just compensation when one's property is taken for

public purposes, is usually applicable in practice to the power of eminent domain. If, however, in a peculiar state of facts, it shall be found directly hostile to a certain exercise of the taxing power, *or of any other power*, the restriction will be supreme, and the power must be so far surrendered." [*Zoeller v. Kellogg*, 4 Mo. App. 163, at 167.]

The tax-bills sued on accrued in August, 1873, two years before the Constitution of 1875 was adopted. While the decision was not rendered till 1877, it ought to be classed with those rendered by the Supreme Court prior to 1875, and the substance of this decision must have been in the mind of the members of the Constitutional Convention when they proposed this Constitution of 1875, and in the minds of the people of this State when they adopted it. The opposite of this theory under consideration virtually affirms that in the matter of local taxation the legislative power is not governed by the Constitution. The Constitution of New York differs from that of Missouri. The Constitution of New York, by a special clause therein, delegates this whole matter to the Legislature. Of course this part of the Constitution of New York is constitutional according to the Constitution of New York.

The rule of constitutional law is very general. "Private property shall not be taken for public use without just compensation." Neither the legislative, judicial or executive departments of government nor all combined, either directly or indirectly, can take private property for public use without just compensation in any case. There are no exceptions to this constitutional restriction.

"Local assessments are constitutional only when imposed to pay for local improvements conferring special benefits." [*State ex rel. v. Leffingwell*, 54 Mo. 458, at 474.] The local assessment may be according

to value or by the front foot or by the square foot or according to advantage or benefit; in all cases the local assessment is unconstitutional unless special benefits exist as defined in the decisions of the courts. Local taxation by the acre or according to frontage or by the square foot or according to benefit, is no violation of the rule of constitutional law that "All property subject to taxation shall be taxed in proportion to its value."

Local taxation by the acre or according to frontage or by the square foot or according to value or according to benefit, if there be in any of the methods of local taxation a lack of this peculiar, exceptive benefit, is a violation of that rule of constitutional law that "Private property shall not be taken for public use without just compensation." It is the fact of taking private property for public use without just compensation which is prohibited and not the method. The method is wholly immaterial. Local taxation is unconstitutional unless there is this peculiar exceptive benefit.

"The constitutional validity of a law is to be tested not by what has been done under it, but by what by its authority may be done." [Stewart v. Palmer, 74 N. Y. 183, at 188.] That this is the rule (or rather was the rule) in Missouri appears from the opinion of the court in *City of St. Louis to use v. Allen*, in 53 Mo. 44, at 55, where the court in rendering the opinion say:

"The idea that a city could improve a street, and assess the property benefited thereby, and sell the entire property, and then go on the owner of the property who may reside out of the city, and sell his property there to pay the balance of the assessment, and this all in consideration of the benefit conferred on his property, which was already sold, would seem at least in its results like taking the property of the owner and converting it to public use without any just compensation.

I do not believe that by this indirection you can do that which is forbidden by the Constitution if directly done. If a personal judgment can be rendered in such case all this *may happen*. *It is true it is not likely to happen, but the fact that it may possibly happen is enough to defeat the law.*"

"If we construe the statute in reference to these assessments to authorize a personal judgment, by which such results *might* follow, it would make the statute unconstitutional and void," because it might possibly happen that outside property would be sold; it need not actually be sold. In the opinion of the court it was then too late to apply this rule to local taxation by the front foot. It might possibly happen that *abutting* property was not benefited and hence the rule of constitutional law would render the statute void.

"If the power of municipal corporations to make these local improvements and make special assessments against the adjoining property for the cost thereof, in proportion to the front foot or otherwise was a new question in this State, it might be difficult to find any sufficient warrant in the Constitution to justify such assessments or taxation, but this method of taxation has been recognized and acted on too long to now be questioned, but it is certainly the duty of the courts to see that its exercise is kept within proper limit," i. e., the limit of special, peculiar, exceptive benefit.

What is this "*proper limit*" within which the courts are to confine this power of local taxation? If it is not the limit fixed by the Constitution, what is it? There is a power somewhere that limits this power to tax. The statute fixes no limit; the Constitution does and the statute is void if it exceeds this limit of benefit.

If the abutting property be benefited to an amount equal to ten times or one hundred times the cost, still this local tax law is void—unconstitutional—on the

ground of taking private property for public use without just compensation if it authorizes a personal judgment against the owner because it may possibly happen that other distant property not benefited may be sold.

While *Garrett v. St. Louis* and *Newby v. Platte County* established the rule of constitutional law that to withhold any portion of the just compensation on account of benefits to adjoining property, when the benefits are not special, peculiar, and exceptive, is a taking of private property for public use without just compensation, the statutes were not construed according to the rule laid down in the case of *Stewart v. Palmer*, 74 N. Y. 183, at 188.

The statutes construed merely used the term "advantage" or "benefit." The court added the proviso that the benefits must be special, peculiar, exceptive in order to avoid conflicts with the constitutional rule providing that "private property shall not be taken for public use without just compensation." "It is evident that the advantages or benefits spoken of must have some limits" (25 Mo. 512). And the court in requiring this exceptive benefit, proceeds to put a limit in the law not enacted by the Legislature, to render the law constitutional.

The test of the constitutional validity of a law is discussed in *City of St. Louis to use of Seibert v. Allen*, in 53 Mo. 44 (1873). It is not necessary that the ill consequences appear in the particular case. The bad result may not be present. "It is true it is not likely to happen, but the fact that *it may possibly happen is enough to condemn the law.*" [Id., page 55.]

"The constitutional validity of a law is to be tested not by what has been done under it, but by what *by its authority may be done,*" say the Supreme Court of New York in *Stewart v. Palmer*, 74 N. Y. 183, at 188, quoted *supra*.

“This test is accurate,” say the Supreme Court of the United States in 1893, in *Montana Company v. St. Louis Company*, 152 U. S. 160-1, at 170, “provided of course it is limited to what may rightfully be done and does not extend to that which is wrongfully, though under pretense of the statute, done.” The Montana statute there in controversy (152 U. S., supra) authorized a hearing in court on notice given. The right was tried in court. What may be rightfully done under the Montana statute was tried in court under that statute and the case was appealed to the Supreme Court of the State where the judgment was affirmed. What was done was done under actual authority, not under pretense or color of authority.

Does the rule prescribed by statute come in conflict with that prescribed by the Constitution? Has the Legislature prescribed a rule forbidden by the Constitution?

Let the statute in terms provide beyond a doubt that in levying this tax a general benefit is sufficient: may the taxing power rightfully under such statute levy the tax where such general benefit only exists?

In rendering the opinion of the Supreme Court of Missouri in *City of Pleasant Hill v. Dasher*, 120 Mo. 675, at 680 (A. D. 1893), the court, referring to *City of St. Louis to use of Seibert v. Allen*, 53 Mo. 44, says:

“It was held in clear and distinct terms that the Legislature had no power to authorize a personal judgment against the property-owner in suits to recover these local assessments.”

Now apply the same construction to local taxation according to the frontage. This special, peculiar, exceptive benefit is incorporated into the statute by the court in order to render the statute constitutional. Local taxation according to general benefit is unconstitutional. That was not denied in any case until after

1880. The same exceptive benefit was added by the court to all local taxation. It made no sort of difference whether this local tax was according to benefit or according to value or by the acre or according to frontage or otherwise, the court in all cases added the exceptive benefit in order to its constitutional validity. This exceptive benefit has been judicially incorporated into this and like statutes for so long a time that the court now (A. D. 1873 and since) decline to consider these laws unconstitutional on the ground of "what may possibly happen" under a literal interpretation of them. The Legislature passed laws that were unconstitutional until such laws were amended by the courts so as to make them conform to the Constitution by requiring this exceptive benefit in addition to the legislative requirements. The writer would mildly suggest that it is best to allow the Legislature to make the laws, and if the law so made fails to conform to the constitutional requirements, decide it void and allow the Legislature to make a new law.

In *Newby v. Platte County* the road law of 1845, as amended by the court, was held to be constitutional. Perhaps if this judicial amendment, incorporated into the law by the courts, had been offered in the Legislature it would have defeated the enactment of the law. The special benefit was necessary to the constitutional validity of the law and this judicial construction of the Constitution became a part of the Constitution the same as if incorporated into it.

The question is one of legislative intent alone, in the construction of statute law (for a state constitution is a statute within the rule). If the Legislature of Missouri had in her road law of 1845 provided that the road commissioners or jury should take into consideration the advantages as well as disadvantages, and that the advantages to be considered must be special, pecul-

iar, exceptive, then their act would have been constitutional. But suppose in a separate section, there was a provision that general benefits should be taken into consideration, then this section alone should have been unconstitutional.

A question similar to this came up in *Connolly v. Union Sewer Pipe Co.* (A. D. 1902), 184 U. S. 540. In the majority opinion the court says:

“The principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the Legislature, then the entire statute must be held inoperative. The first section of the act here in question embraces by its terms all persons, firms, corporations, or associations of persons who combine their capital, skill or acts for any of the purposes specified, while the ninth section declares that the statute shall not apply to agriculturists or live-stock dealers in respect of their products or stock in hand. If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturists and live stock dealers. Those classes would in that way be reached and fined, when, evidently, the Legislature intended that they should not be regarded as offending against the law, even if they did combine their capital, skill or acts in respect of their products or stock in hand. Looking then at all the sections together, we must hold that the Legislature would not have entered upon or continued the policy indicated by the statute unless agriculturists and live-stock dealers were excluded from its operation and thereby protected from prosecution. The result is that the statute

must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section." But persons are not embraced.

The obnoxious section of the Illinois statute is embraced in these words as quoted in the opinion at page 554, near the bottom:

"Section 9. The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

This act shall not apply to, first, agricultural products in the hands of the producer or raiser; second, to live stock in the hands of the producer or raiser. The Illinois Legislature did not intend that agriculturists might do the forbidden things without liability to prosecution. It did not intend that raisers or producers of live stock should not be subject to the penalties of the law. Agriculturists and stock raisers could not combine to make sewer pipe and control the market price. They are within the statute notwithstanding section 9.

Section 8 declares void any contract or agreement made in violation of the law, and the contract is not enforceable in the courts. Of course an executory contract could not be enforced. But if the contract is executed by delivery and acceptance of the property, then the contract is void and the purchaser has the seller's property not paid for and the seller will quickly arrive at *the locus penitentiae* and sue for the value of the property. The seller will repudiate the illegal contract and sue for the property or its value.

Section 10 provides that any purchaser shall not be liable for the price or payment of such articles and may plead the act as a defense. But if sold for cash the purchaser has no recourse or remedy. With all due respect to the justice rendering the opinion of the

court and the justices concurring therein, the doctrine announced is a very dangerous one. This Illinois statute undoubtedly intended to include and did include sewer pipe manufacturing and selling and what the Union Sewer Pipe Manufacturing Company did was intended to be prohibited and the contract was intended to be rendered void.

The State of Illinois undoubtedly needs and uses a vast amount of sewer and drainage pipe, as well as a large amount of agricultural products and live stock.

May the Legislature enact laws on this subject and prevent combinations and trusts in drainage and sewer pipe, its manufacture and sale, or may combinations and trusts be made to an unlimited extent with no power in the Legislature to afford relief?

The court say (and very properly) that this Illinois statute is very general, and agriculturists and stock raisers are included in the several sections but excluded by section 9.

Suppose the language of the Illinois statute had been changed, and sewer and drainage pipe makers and dealers had been named by specific words in the legislative act and all others had been omitted, would such statute contravene the fourteenth amendment as being a denial of the equal protection of the laws? Say the court at page 556:

“That the arrangement or combination made between the Union Sewer Pipe Company and other companies, corporations and firms, created such a trust as the Illinois statute forbids, is manifest from the evidence in the record. It is equally true that if the plaintiff was an Illinois corporation, its charter could be forfeited and an end put to its corporate existence by proceedings instituted by the attorney-general of the State under sections 1, 2, and 3. It is also clear that, if the statute is not altogether invalid the defendants could

plead non-liability for the pipe purchased by them upon the ground that the plaintiff was, under the statute of Illinois, an illegal combination and the contracts which it made with the defendants were void. [Sections 8 and 10.] The statute expressly authorizes such a defense. In that particular, the defense based upon the statute of Illinois differs from the other special defenses."

Conform the statute to the particular case in hand so as to include all sewer and drainage pipe and the statute will read thus:

"Sec. 1. That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or two or more of them in the manufacture, transportation, and sale of sewer and drainage pipe for either, any or all of the following purposes: First, to create or carry out restrictions in trade in sewer and drainage pipe; second, to limit or reduce the production or increase or reduce the price of sewer and drainage pipe; third, to prevent competition in the manufacture, making, transportation, sale or purchase of sewer and drainage pipe; fourth, to fix at any standard or figure whereby its price to the public shall be in any manner controlled or established upon any sewer or drainage pipe intended for sale, use or consumption in this State, or to establish any pretended agency whereby the sale of said sewer or drainage pipe shall be covered up and made to appear for the original vendor for a like purpose or purposes, and to enable such original vendor or manufacturer to control the wholesale or retail price of any such sewer or drainage pipe after the title to such sewer or drainage pipe shall have passed from such vendor or manufacturer; fifth, to make, enter into or examine or carry out any contract, obligation or agreement of any kind or description by which they shall

bind or have bound themselves not to sell, dispose of or transport any such sewer or drainage pipe below a common standard, figure or card or list price, or by which they shall agree in any manner to keep the price of such sewer and drainage pipe at a fixed or graduated figure, or by which they shall in any manner settle or establish the price of any sewer or drainage pipe between them or themselves and others or to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such sewer or drainage pipe, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or transportation of any such sewer and drainage pipe, that its price might in any manner be affected.

“Sec. 2. That any corporation holding a charter under the laws of this State which shall violate any of the provisions of this act shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine.

“Sec. 3. For a violation of any of the provisions of this act by any corporation mentioned herein, it shall be the duty of the attorney-general or prosecuting attorney, upon his own motion, to institute suit or quo warranto proceedings at any county in this State in which such corporation exists, does business or may have a domicile, for the forfeiture of its charter rights and franchise, and the dissolution of its corporate existence.

“Sec. 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this State, and it shall be the duty of the attorney-general to enforce this provision by injunction or other proper proceeding, in any county in which such foreign corporation does business, in the name of the State on his relation.

"Sec. 5. Any violation of either or all of the provisions of section one of this act shall be and is hereby declared to be a conspiracy against trade and a misdemeanor; and any person who may be or may become engaged in any such conspiracy, or take part therein, or aid or advise in its commission, or who shall, as principal, manager, director, agent, servant or employee, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, orders thereunder, or in pursuance thereof, shall be punished by fine not less than \$2,000 nor more \$5,000.

"Sec. 6. In any indictment or information for any offense named in this act, it is sufficient to state the purposes and effects of the trusts or combinations in sewer and drainage pipe and that the accused was a member of, acted with or in pursuance of it, without giving its name or description, or how or where it was created.

"Sec. 7. In prosecutions under this act it shall be sufficient to prove that a trust or combination as defined herein exists, and that the defendant belonged to it or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all.

"Sec. 8. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable either in law or equity.

"Sec. 9. Will be omitted as of no use because the act is directed against sewer and drainage pipe alone.

"Sec. 10. Any purchaser of any sewer or drainage pipe from any person, firm, corporation or association of persons, or of two or more of them, transacting business contrary to any provision of the preceding sections of this act, shall not be liable for the price or payment of such sewer or drainage pipe and may plead

this as a defense to any suit for such price or payment."

It is said that the Legislature of Illinois cannot make a class and declare penalties against the class, and then by an independent section provide that certain persons in this class shall be exempt from the penalties provided in the act. But they can make classes. Can they declare who shall be members of the class? Then they can determine who shall not be members of the class. This is what the Illinois Legislature did. Farmers and stock raisers were not in the class. Makers of sewer pipe were included in the class and farmers excluded. It was not intended that farmers might make sewer and drainage pipe, and if they did so, they would not be amenable to the act of the Illinois Legislature. It was not intended that if stock raisers should make sewer and drainage pipe, and if they made such sewer and drainage pipe and entered into combinations and trusts, they were not amenable to the act. No such exemption was intended. The classification is not arbitrary as if the Illinois Legislature declared that all red-headed men should be exempt from all penalties enjoined by the act, that they might make and sell sewer and drainage pipe and make all the combinations, trusts forbidden by the act without incurring the penalties inflicted on men not red-headed. Man, woman and child, old and young, rich and poor, white and black, citizen and denizen, alien may raise agricultural products and live stock. Every one has the absolutely equal protection of the law. It is denied to no one. "The provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser." The *product* is exempt no difference who may be the producer. Live stock is exempt no difference who may be the raiser. Every one receives the equal protection of this Illinois statute. It

is indeed somewhat singular that the Illinois Legislature should have power to declare that farmers and stock raisers were in the class and yet they have not the power to declare that they were not in class. They have power to include, but they cannot exclude. The power to declare who shall be in the class, implies the power to declare who shall not be in the class. Every sewer pipe manufacturer in the United States may go to Illinois and raise all the potatoes he wants, even if they cost him two dollars each, and he will not be amenable to the penalties of this Illinois statute. Sewer and drainage pipe are within the statute. Potatoes are not within the statute as long as the raiser keeps them in his possession. Corn and wheat are in the same class till they get out of the farmer's hands and go to elevators in Chicago and there combinations and trusts are harmful and are forbidden by all to all without exception and without excluding any man, woman or child, white or black, rich or poor. Illinois did not deny to any person within its jurisdiction "the equal protection of the laws."

The Illinois Legislature may pass laws to prevent horse stealing; they may make a class excluding work oxen from the class. This may be done by an express exclusion or an implied exclusion by failing to name work oxen, for "*expressio unius, exclusio alterius*." Horse stealing is forbidden to all. The horse thief when arraigned in court pleads that he is entitled to the equal protection of the law with the ox thief. Under such a construction, the fourteenth amendment becomes a very strong protection to horse thieves. Ox thieves are excepted and courts must presume that the Legislature would not have passed the law if they had had an idea that ox thieves were not to be punished. The Illinois statute forbids things, not persons. The things forbidden can not be done by any one.

The Illinois statute provides that this law shall not apply to agricultural products or live stock in the hands of the raiser or producer. The law does apply to the agricultural product and live stock after it leaves the hands of the producer or raiser. The Illinois act would be different if it had provided that it did not apply to "agriculturists and stock raisers" in place of agricultural products and live stock. The constitutional amendment is, "nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." This does not mean that the State must give the same equal protection to the gambler in his gambling that it gives to the preacher in his preaching, or the teacher in his teaching, or the thief in his thieving. Things are prohibited by the fourteenth amendment, not names. It was not intended that rogues should be protected in their roguery equal to the protection to honest men in their honesty.

"We have seen that under that statute all except producers of agricultural commodities and raisers of live stock, who combine their capital, skill or acts for any of the purposes named in the act, may be punished as criminals, while agriculturists and live stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, and may combine and do that which, if done by others, would be a crime against the State."

Suppose producers of agricultural commodities and raisers of live stock combine their capital, skill or acts for making and selling sewer and drainage pipe, just as the Union Sewer Pipe Company did, would they be exempt from punishment as criminals? Is this the intention of the Illinois Legislature? The court continuing say, page 560:

“The statute so provides, notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a State, and agriculturalists and raisers of live stock, are all in the same general class; that is, they are all alike engaged in domestic trade, which is, of right, open to all, subject to such regulations, applicable alike to all in like conditions, as the State may legally prescribe.”

And there is not one single member of that class that can make sewer pipe and enter into the forbidden combinations without liability to punishment. The statute did not intend to prohibit the farmer or stock raiser from making sewer pipe. The statute did not prohibit the sewer-pipe maker from producing agricultural products or raising live stock. The merchant, the mechanic, the lawyer, the doctor, the preacher, the sewer-pipe maker may all raise agricultural products, and the whole class are treated exactly alike under this Illinois statute. And the merchant, the mechanic, the lawyer, the doctor, the preacher, the teacher, the farmer, and the stock raiser may all make sewer pipe. It is not prohibited to any one of the class. It was not intended to be allowed to one of the class and prohibited to another of the class.

The Illinois Legislature provides that certain acts should not be done, irrespective of who was the actor. The prohibition is absolutely universal, even the governor of the State, judges of the Supreme Court and all the members of the Legislature, the whole State without one exception—all are included. The Illinois Legislature by the act in question did not “deny to any person within its jurisdiction the equal protection of the laws.” Nobody is prohibited by the statute from raising live stock; nobody is prohibited by the statute from raising agricultural products. If the Illinois statute had provided that agriculturalists and stock

raisers should not be deemed within the legislative enactments, then the sewer-pipe makers might raise an acre of agricultural products and make millions of sewer pipe, and then the courts might inquire whether the sewer-pipe maker was really an agriculturist or was his business a mere pretext or sham so as to bring his acts and products within the law. The Illinois Legislature avoided this trouble by prohibiting certain acts no difference who was the actor. It is a mistake to say that the Illinois Legislature intended that agriculturists might produce agricultural products and enter into all sorts of combinations and trusts without criminal or civil liability. The Illinois statute provides that the provisions of the act shall not apply to agricultural products or live stock. Suppose we leave off the restriction while "in the hands of the producer or raiser," leaving the statute to except agricultural products and live stock. It does not exempt black men or white men or red-haired men or freckle-faced women. It does not exempt the person at all, but the product. They exempt the product and not the producer. May the Legislature limit the exemption of this product still further by confining it to the time that the product is in the hands of the producer? The mischief of the trust and combination becomes apparent and exists only after the corn and wheat have left the hands of the producer and gotten to the boards of trade for purposes not clearly distinguished from gambling. May the Legislature protect the producer and consumer from the evil effects of combinations and trusts?

This case and that of *Neuby v. Platte County*, 25 Mo. 258, are examples of the judicial twisting process of legislative enactments. Acts are forbidden under the Illinois legislative enactment now under discussion. No state can under the fourteenth amendment to the Constitution of the United States deny to any per-

son the equal protection of the laws. The Illinois legislative act is judicially changed so as to punish all for the forbidden acts except agriculturists and stock raisers. If the State punish the strumpet for her strumpetry, it must likewise punish the virtuous woman for her virtue. The Missouri act is so changed as to include only special, peculiar, exceptive benefits. A general benefit would render the Missouri act unconstitutional.

"If the latter section [the one excluding agricultural products and live stock] be eliminated as unconstitutional, then the act if it stands will apply to agriculturists and live stock dealers; these classes would in that way be reached and fined when the Legislature did not so intend. We must hold that the Legislature would not have entered upon or continued the policy indicated by the statute unless agriculturists and live-stock dealers were excluded from its operation and thereby protected from prosecution."

The live stock dealer and the agriculturist are no more excluded or exempted by the act than the maker and seller of sewer pipe or the red-haired man or freckled-faced woman.

What the Union Sewer Pipe Company did, did not render their contract with the purchasers of sewer pipe void under any statute of the United States. The sale of sewer pipe by the Union Sewer Pipe Company was not void or illegal under the general common law of Illinois. Under the Illinois statute what this Union Sewer Pipe Company did, rendered its contract of sale void and it could not recover on such contract of sale. If an agriculturist or live-stock raiser had done in sewer pipe what the Union Sewer Pipe Company did, the live-stock raiser and the agriculturist would have been subject to all the liabilities to which the sewer pipe company was subject. What the sewer pipe company did, did not render the contract of sale of sewer pipe void

under general common law. If the subject matter of that contract of sale had been agricultural products in lieu of sewer pipe, that contract of sale of agricultural products would not be void under general common law.

The Legislature of Illinois changed the general common law in reference to the contract of sale of sewer pipe, when the seller is a member of some forbidden trust. It makes no difference whether the seller of sewer or drainage pipe be an agriculturist or live stock raiser, he can not recover on the forbidden contract of sale of drainage pipe. The common law has been changed. Who but the Illinois Legislature shall determine the extent of that change?

Corn and wheat are agricultural products, and after they have left the hands of the raiser then they come within the Illinois statute. A trust may be formed to obtain all the wheat and flour in Illinois; the products may be cornered and the consumers may be compelled to pay exorbitant prices. The Illinois statute made such sales void, and even if the wheat were delivered, no recovery could be had on the contract if the seller was a member of this forbidden trust. If all the wheat raisers of Illinois had combined in a trust to increase the price of the wheat they raise while in their hands, then this contract they make among themselves can not be enforced at common law. If one member of the trust violate the trust agreement, no action lies at common law for damages for the breach of such agreement. This Illinois statute left the wheat raisers of Illinois, with reference to the wheat they raised and in their possession, just where the common law left them. They could maintain no action for damages for the breach of this trust agreement. If they sold the wheat they raised, they could recover on the contract of sale under the general common law, notwithstanding the raiser of the wheat was a member of this illegal trust.

The Illinois statute did not change that rule of the common law. There are so many wheat raisers that it is physically impossible to get them into a trust which may at any time be violated by any one or more without redress at law or in equity or under any statute.

The wheat raised by any one while in his possession as raiser is not within the Illinois statute. The law applies to the product, not to the producer. There can be no difference as to what person, firm or corporation may be producer. All producers have the equal protection of this Illinois statute.

A father presented to his son a bundle of sticks tied together and requested the son to break the bundle by putting one hand at each end and his knee in the middle and drawing the two ends towards his body. The son tried in vain to break the bundle. In union there is strength. The father untied the bundle and broke the sticks one by one without difficulty. Readers will recollect the old legend. The Legislature of Illinois might have broken the trusts if it had not tied them all up in one bundle. In union there is strength even among the trusts, knowing as one must necessarily know the stolid indifference of the honest masses and the pernicious activity of the dishonest trusts. The Illinois statute, as interpreted by the courts, ties all the trusts together in one bundle and then in vain tries to break the whole bundle. Disastrous failure was of course the result. The Legislature had all the necessary power and authority to break the sewer-pipe trust, but the other trusts combined with it proved too powerful.

Our local tax-laws in all the states under the tax power have tied up large bundles of sticks and the strings are so strong we can not break them, nor untie the bundles or break the sticks. This is the lesson taught by the Illinois statute and decisions holding it

invalid. Of course no one can deny that this Illinois statute is highly penal in its character. A statute which allows any one to buy sewer pipe and to keep the sewer pipe and sell or use it, and yet incur no liability whatever either to pay the contract price or return the sewer pipe or to pay what it is reasonably worth, is highly penal in its character and ought to be strictly construed, and yet the State of Illinois ought to be able to prevent hurtful, injurious trusts by such penalties as it may prescribe to be inflicted upon all who may do the prohibited acts, without any respect as to who may be the actor or doer of the prohibited thing.

CHAPTER 7.

POWER OF GOVERNMENT AS TO PROPERTY, BENEFITS AND DAMAGES.

In this chapter is presented some considerations as to the nature of that power of the government which determines whether a person has property, what property, how much, and its value, and the benefits or damages to it by reason of the acts of the public or individuals, both as to the fact and amount of benefit or damage.

The power to determine the value of property is judicial. This appears fully in *Smith et al. v. Kansas City*, 128 Mo. 23, et seq. (A. D. 1894), a suit for damages to abutting property by reason of grading the street. The first instruction given for the plaintiff is in effect that, "If the market value of said property was depreciated by said grading" then the jury must find for the plaintiff and if the jury find for the plaintiff then their verdict must be equal to "The amount that the market value of said property was diminished by such act of the defendant" Kansas City. The market value of the property before the improvement and the market value after the improvement must be determined. The difference will be benefit or damage according to the fact and evidence by which such fact is established.

By the third instruction the jury were told that in estimating the damages to said property they might take into consideration certain elements, such as the "cost of putting the property on grade, or building retaining walls and other elements of damage," allowing, however, as an offset, any appreciation or increase

in value of said property by reason of the grading of said street. For the defendant the jury were told that, "If the grading was a special benefit to the real estate along with other property in the vicinity of plaintiff's property, and that such special benefit equaled or exceeded the damages, then plaintiff is not entitled to recover," etc.

The legislative power can not determine the market value of this lot before the improvement or after this improvement. How then can the legislative power determine that the improvement was a damage or benefit? The Missouri Constitution, as well as the constitutions of nearly all the states, now provides that "private property shall not be taken or damaged for public use without just compensation." This "just compensation," either for taking or damaging, must be ascertained by commissioners or a jury as provided by law; the title must not be divested; the property must not be disturbed until this "just compensation," either for taking or damaging, has been paid to the owner or into court for the owner.

According to the language used by the framers of the Constitution, it was not intended that this "just compensation," either for taking or damaging, should be ascertained by the mayor and common council of any city, town or village, or under or by any legislative or executive power. This "just compensation" must be paid to the landowner or into court for him. Into what court? Is the board of trustees of any town or village the court contemplated by the Constitution? Is the common council of any city the court contemplated by the Constitution into which this "just compensation" must be paid for the landowner? Then the "just compensation" is paid into some court for the owner. Who shall determine this question of ownership. Does the determination of this question of ownership devolve on

the judicial department of the government, or on the legislative department, or on the executive department? What kind of question is it to determine the "just compensation" for land taken or damaged for public use?

The Supreme Court of Missouri in A. D. 1857, in *Newby v. Platte County*, 25 Mo. 258, at 263, say:

"If the state government possessed no authority over private property, except that of taking it for the public use upon rendering the owner a just compensation, it would seem that under this provision, the owner would be entitled to the full money value of his property without any deduction. *The rule of constitutional law being that private property can not be taken for public use by the authority of the Legislature without a just compensation, it follows that what is to be considered as compensation, within the meaning of the clause, is a question of law for the courts and not a matter for the Legislature;* and under such a Constitution as we have supposed, with no other power over private property than that of taking it for the public use upon making the owner a just compensation, it would be quite beyond the scope of the legislative authority to declare that the benefit derived by the landowner from the road is the just compensation secured by the Constitution."

The public take for a highway part of an owner's land, leaving part of it. What is the owner's "just compensation?" It is not, what is he damaged? To ascertain this, just compensation must be done by some department of the government. May this just compensation be benefits in part and cash in part? What sort of question is this? Is it a question for the courts or the Legislature or the executive? What department of the government is to determine this question? If the just compensation of the Constitution may be made in benefits, who shall determine the fact and amount of

benefits? Can a general benefit be a part of this just compensation of the Constitution? Who shall determine this question? In its determination what kind of power is exercised?

The question as to the nature of the power to ascertain the "just compensation" for property taken for public use, was discussed in *Monongahela Navigation Company v. United States*, 148 U. S. 312. The Monongahela Navigation Company, under acts of the Pennsylvania Legislature and by consent of Congress, had erected dams in the Monongahela river and rendered it navigable to a point at or near the West Virginia line. The Congress of the United States passed an act to improve the navigation of this river, and to this end negotiations were to be made to purchase the dams, and if such negotiations were unsuccessful, then the secretary of war was to begin condemnation proceedings in the United States Circuit Court in Pennsylvania, either party having the right to writ of error or appeal. The Act of Congress had this provision:

"Provided, that in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated." [Vol. 25, U. S. Statutes at Large, 400-411, Chap. 860.]

It does seem that the court mistook the meaning of Congress. That a franchise is property can not be denied. But this franchise was wholly unnecessary to the United States. Congress evinced no desire to condemn this franchise. The United States could improve this river, under the Constitution of the United States, without getting the right to do so from this corporation. If the negotiations had been successful and the United States had bought this dam No. 7, is it possible that the United States must go further and buy this franchise before the dam No. 7 can be used by the public under the United States? But as construed by the

Supreme Court of the United States it was necessary to condemn and take this franchise. The United States could not do without it.

Speaking of "just compensation," and remarking that "just" renders the matter emphatic and that "just compensation" is to be a full equivalent for the property taken, the court say (page 326):

"This excludes the taking into account, as an element in the compensation, any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated, and leaves it to stand as a declaration that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner.

"We do not refer in this to the case where only a portion of a tract is taken, or express any opinion on the vexed question as to the extent to which the benefits or injuries to the portion not taken may be brought into consideration."

After remarking that this question may come up in the future trial of this case, the court continuing say:

"By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. *But this is a judicial and not a legislative question.* The Legislature may determine what private property is needed for public purposes [Did the government *need* the franchise?]*—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial.* It does not rest with the public taking the property, through Congress or the Legislature, its representative, to say what compensation shall be paid or even what shall be the rule of compensation. The Constitution has declared that just compensation

shall be paid and the ascertainment of that is a judicial inquiry." In *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, at 571, Mr. Justice McLean, in his opinion, referring to a provision for compensation found in the charter of the Warren Bridge, uses this language:

"They (the Legislature) provide that the new company shall pay annually to the college, in behalf of the old one, one hundred pounds. By this provision it appears that the Legislature has undertaken to do what a jury of the country only could constitutionally do; assess the amount of compensation to which the complainants are entitled." See, also, the following authorities; *Commonwealth v. Pittsburgh & Connellsville Railroad*, 58 Penn. St. 26-50; *Penn. Railroad v. Balt. & Ohio Railroad*, 60 Maryland 263; *Isom v. Mississippi Central Railroad*, 36 Mississippi 300.

In the last of these cases, and on page 315, will be found these observations of the court:

"The right of the Legislature of the State, by law, to apply the property of the citizen to public use, and then to constitute itself the judge in its own case to determine what is the just compensation it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent, or to extinguish any part of such compensation by prospective conjectural advantage, or in any manner to interfere with the just powers and province of courts and juries in administering right and justice, can not for a moment be admitted or tolerated under our Constitution. If anything can be clear and undeniable, upon principles of natural justice or constitutional law, it seems that this must be so."

"We are not therefore concluded by the declaration in the act that the franchise to collect tolls is not to be considered in estimating the sum to be paid for the property."

Mr. Welty, in his work on Assessments, page 37, section 25, says:

“Sec. 25. *Assessors act both Judicially and Ministerially.*—In the exercise of the functions and in the discharge of the duties of his office, an assessor acts both judicially and ministerially; some of his acts are judicial and some are ministerial. When it becomes necessary to determine a question of law or fact, the act is judicial. It may safely be affirmed that in no instance does an assessor perform all the acts necessary to perfect the assessment of a single person or item of property without the exercise of acts ‘Eminently judicial in their nature.’ He is clothed with power to administer oaths; to receive both written and oral statements touching the matters his office gives him jurisdiction to inquire about, and to determine the facts necessarily entering into an assessment; such as the liability of persons to assessment and taxation within his district; *the property owned by them and the portion thereof subject to taxation; the portion thereof, if any, exempt from taxation and the value thereof. These acts are spoken of in all the cases as judicial in their nature.* There are other acts which are merely ministerial.”

In note 1, page 38, the author quotes from *Weaver v. Devendorf*, 3 Denio 117, wherein the court say: “In some particulars the duty of the assessors is undoubtedly ministerial; but in fixing the value of tangible property the power exercised is in its nature purely judicial.” If it were true that the power to ascertain the value of property was legislative in its nature, then the Constitution must be changed. The “just compensation” of the Constitution contemplates a jury or commissioners and a court into which money may be paid, evidently a judicial proceeding. When the whole land is taken, then the value of the land is the “just com-

pensation.” Can the legislative power determine that value? Can the Legislature do what the Constitution requires a jury to do? If the Legislature may in this one instance do what the Constitution requires the court and jury to do, why may not the Legislature itself do all the things that the Constitution requires the court and jury to do?

The Legislature is not only without power to determine the value of real estate before a public improvement is made in its vicinity or after it is made and for that reason can not determine benefits or damages, but the legislative power can not determine the number of articles of personal property belonging to any one. Not only is the legislative power without authority to fix the value for taxation of farmer Smith’s cow or his mule or his horse or his wagon or his harness, but the legislative power can not determine how many mules, horses or cows farmer Smith owns. The legislative power can not enter farmer Smith’s hen roost and count and value his chickens for taxation and bind farmer Smith by the count and value. The legislative power can not enter farmer Smith’s horse lot or stables and count and value his cows, his mules or his horses and bind him by such count and value. The legislative power can not enter the merchant’s store and measure the number of yards of ribbon and of calico in the store or weigh his sugar and coffee and salt and bind such merchant by such weight or measurement for purposes of taxation.

If the legislative power may determine that farmer Smith has two mules, when in fact he has only one, and bind farmer Smith by such count, then such legislative power may determine that farmer Smith has one hundred mules when in fact he has none, and farmer Smith will be without remedy in the courts. If the legislative power refer the matter of value to a judicial

office on notice and hearing, and only determine number, it will be just as difficult for the assessor acting judicially to determine the value of non-existent mules as to determine the value of non-existent benefits. If the legislative power can not determine that farmer Smith has for taxation one thousand dollars worth of mules, that legislative power can not determine that he has for taxation one thousand dollars worth of benefits. If this be not true then the legislative power may for purposes of taxation determine that each farmer has two hundred mules worth \$250 each for taxation, and enforce the collection of the tax, and the farmer will have no remedy in the courts to show the error in value or number. All such acts although enacted in the form of laws, are not laws; *they are not within the bounds of legislative power*. The acts are those of the trespasser, the robber, the thief. They are not acts of legislation.

“It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power, and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation. To the Legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of legislative power, is well worthy of serious reflection. It is the peculiar province of the Legislature to prescribe general rules for the government of society; *the application of these rules to individuals in society would seem to be the duty of other departments.*” [Fletcher v. Peck, 6 Cranch 87, at 135-6, Marshall, C. J.]

According to the decision in *Monongahela Navigation Co. v. United States*, 148 U. S. 312, the legislative power can not determine “just compensation” for

taking private property for public use; the question is judicial. We have a constitutional provision that private property shall not be taken or damaged for public use without "just compensation." The question what is just compensation for damaging private property for public use, is just as much of a judicial question as what is just compensation for taking private property for public use. If the Legislature cannot prescribe rules to the courts by which to determine just compensation for taking private property for public use, then the Legislature cannot prescribe rules by which to determine just compensation for damaging private property for public use. The question ought to be judicial in both cases or neither. *Monongahela Navigation Company v. United States*, determines another question. The act of Congress provides that nothing shall be allowed for the franchise. This is equivalent to saying the United States do not take the franchise. The United States have no possible use for it. The United States can build those dams and others and let the commerce of the world pass over them without this franchise—without getting any right from the Monongahela Navigation Company. Neither the State of Pennsylvania nor the Congress of the United States could do any act or make any grant that would impair the power of Congress over commerce. Here is a question whether the United States took the franchise or did not take it. Congress evidently had the idea that the United States had no use for the franchise. There was no necessity for taking it as Congress determined (perhaps very properly, too, as the Legislature determines the necessity to take and what to take). Was the franchise taken? I make no assertion here one way or another, either whether it was taken or was not taken, but what sort of question is to be determined? Here Congress did not authorize taking the franchise,

certainly not in terms. Congress provided for taking these dams and paying for them, and further provided that the franchise should not be paid for as they did not need it, and did not take it or propose to take it.

Could Congress do or authorize to be done what was here done, and declare that thereby the franchise was not taken and by such determination conclude the owner of the franchise so that the courts could not inquire into the question? The United States were held to have taken this franchise, although they condemned the locks only. Congress could not declare that the franchise was not taken and by such determination conclude the owner and the courts from inquiring into the question whether it was taken or not. The Legislature make certain legislative enactments. Whether by these enactments private property is or is not taken is a judicial question. The Legislature cannot determine that their acts are not a taking and conclude the property-owner by such legislative determination so that the courts cannot inquire into the matter. Congress declared that they did not take this franchise; the courts declared that they did take it. The courts were not bound by the legislative declaration that the property was not taken. What is a taking within the meaning of the Constitution is a judicial question for the courts. The legislative power, the power that takes land for public use determines the necessity for taking and the amount, and in general this legislative determination to take and the amount cannot be reviewed by the courts.

After there is a legislative determination to take private property for public use, then there must be a taking; and then the question may occur, What is a taking? A block in a city, proposed to be taken for a park, may be full of residences of magnificent proportions, tiled floors, hand-carved mahogany mantels, and other elegant appurtenances of the home. These ele-

gant houses are a damage to a park. They are of no possible use to the public for park purposes. They are a positive damage. Can the legislative power condemn the land alone and pay for the land alone and let the owners keep the houses? The legislative authority say these houses are not necessary for a park, and their determination is in most cases conclusive on the question what to take and what is necessary to be taken. In the condemnation proceeding the owners ask "just compensation" for these slate roofs, these tiled floors, these mahogany mantels, these elegantly hand-carved doors and splendidly cemented cellars. We do not want your mahogany mantels, your slate roofs, your tiled floors. We decide these are not necessary for a park and we are not authorized to take any property unless it is necessary. The legislative power declares it did not take or authorize to be taken these carved mahogany mantels, mosaics, tiled floors, slate roofs and rat-proof cellars. How can you make a park out of a rat-proof cellar? The legislative power declares it did not take this property. Is that legislative determination conclusive on the courts? Here are certain acts done. Do these acts constitute a *taking* within the meaning of that provision of the Constitution that private property shall not be *taken* for public use without just compensation? What power shall determine this question?

The legislative power ought not to be allowed to decide its own case in its own favor and exclude any inquiry on the part of the courts. The thief is arraigned in court for stealing and he pleads not guilty; he says he did not steal and his declaration to that effect, his decision on the fact, is conclusive on the courts. This is the legitimate consequence of this train of reasoning. The judicial power must determine just compensation for private property taken or damaged for public use. The judicial power must determine the

whole matter. What is a taking; what is a damaging; what is just compensation? These are all judicial questions.

If the Legislature decide any one of the above questions, then there is nothing left for the courts to act on. According to the provisions of the Constitution, just compensation for damaging or taking shall be ascertained by a jury or commissioners. If the legislative power decide what is just compensation and bind the courts by such decision, then there is nothing for court, jury or commissioners to do. If the legislative power decide that there is no taking, then there is nothing for court, jury or commissioners to do. If the legislative power decide there is no damaging, then there is nothing for this court, jury or commissioners to determine. The legislative power cannot say we did not take the franchise and bind the owner so the matter could not be inquired into in the courts. The legislative power could not say we did not take the houses in the park district and thereby bind the owners. The whole section in the Constitution is a prohibition.

A corporation is charged with taking land for public use. The corporation decides the case in its own favor by its legislative declaration that it did not take. The legislative power takes or damages property and denies it took or damaged and its legislative denial is conclusive. The question as to what power determines benefits was discussed in *Kansas City v. Baird*, 98 Mo. 215, at 220-1. The verdict embraced all the property in the district. Several pieces of property were marked thus on the verdict opposite the description of the property, "Benefit nothing." Say the court, page 220, bottom:

"The argument is, that the finding of the council is a judicial determination that all property within the defined limits is benefited and that the jury has nothing

to do but apportion the benefits." The court observe: "*The council does not nor can it assess damages or benefits. These questions are left to the jury.*"

The case was a condemnation proceeding. The "damages" spoken of were the just compensation of the Constitution for property taken and the benefits are the special, peculiar, exceptive benefits necessary for this kind of taxation within the benefit district defined by the council. "And the jury has no right to say in its verdict that property within the district prescribed by the ordinance is not benefited at all" (page 217 in brief of counsel). Court and jury found there were no benefits when the council found there were. What was a benefit and how much, were questions for court and jury, certainly not legislative questions. If the legislative power cannot determine benefits in a condemnation proceeding or in a proceeding to ascertain just compensation for damaging private property for public use (and when you determine benefits you exercise the tax-power), how can that legislative power determine the fact and amount of benefits in the exercise of the same tax power to pay for paving a street? The legislative power cannot, under its taxing power, determine benefits for grading a street; how can the Legislature in the exercise of the same tax power determine the fact and amount of benefits for paving? You grade a street and leave the property high up in the air, inaccessible to the owner; what good does a sidewalk to that property do that owner? How can the Legislature determine the fact and amount of benefit? They do not and cannot know the cost of a work which must be let to the lowest bidder. How can they determine that the benefit will equal the cost when without omniscience they cannot determine cost? The charters do not endow them with omniscience. This is about the only power not conferred.

CHAPTER 8.

CHANGES IN JUDICIAL RULINGS.

We come now to a change in the judicial rulings of the Supreme Court of Missouri, and other states also. That change is from the old doctrine as announced in the earlier decisions in favor of individual right, to one directly the opposite.

The first case of importance in which this change is noted is that of *Keith v. Bingham*, 100 Mo. 300 (A. D. 1889). The suit was on a tax-bill for grading the street on which the lot abutted, and against which it was charged to be a lien. The tax-bill sued on was issued July 26, 1883, and was therefore under the Constitution of Missouri of 1875. The ordinance for the work was approved in October, 1882, seven years after the adoption of the Constitution of 1875 and nine years after the Supreme Court decided that "Local assessments are constitutional only when imposed to pay for local improvements conferring special benefits" (54 Mo. 474).

In *Keith v. Bingham* the grading was a damage forbidden by the Constitution, and yet the tax was constitutional as against the very person and property intended to be protected. In rendering the opinion that court, on page 306, says:

"It is claimed by defendant that the tax-bills in suit were issued in violation of that section of the Constitution which declares 'That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed

by law; and until the same shall be paid to the owner or into court for the owner the property shall not be disturbed.' [Const. 1875, art. 2, sec. 21.]

"Looking at this defense from the most favorable standpoint it is evident it is untenable. The section of the Constitution just quoted refers to, and is intended to regulate the exercise of the right of eminent domain, whereas special assessments for local improvements, such as the tax-bills before us, are referable to and sustainable under the taxing power. This distinction is well recognized here and elsewhere in the United States. [*Garrett v. St. Louis* (A. D. 1857), 25 Mo. 505; *Lewis on Eminent Domain*, sec. 5.]"

In the Constitution of Missouri, framed "at the town of St. Louis on the nineteenth day of July, in the year of our Lord one thousand eight hundred and twenty, and of the independence of the United States of America the forty-fifth," occurs in article 13, subdivision 5, this language. "And that no private property ought to be taken or applied to public use without just compensation."

In *St. Louis v. Peter Gurno*, 12 Mo. 414, an action on the case for damages to Mr. Gurno's property in St. Louis by reason of grading and paving the street in front of his property, the report says: "The jury found the defendant guilty and assessed the damages at \$1,675" (the City of St. Louis being defendant below, but plaintiff in error above). This damage appears to have been done in 1843 and the case determined in the Supreme Court of Missouri in 1849. Here were damages to the amount found. And yet plaintiff could not recover. Two years later *Taylor v. St. Louis* was decided by the same court (14 Mo. 20). No damages were found by court or jury. The court instructed the jury that "Any injury to adjoining property caused by grading the same in a skillful and prop-

er manner, is not an appropriation of private property for which the owner of said adjoining property can recover in an action against the city" (p. 21-22).

Say the court, p. 24:

"To grade a street or alley already dedicated to public use, is not an exercise of eminent domain so as to require compensation. *It is not appropriating private property to public use, but simply an exercise of power over what is already public property.* The damage resulting by causing the plaintiffs to rebuild or prop up their falling walls is consequential and . . . the city is not responsible." But in all these cases the property was damaged.

The constitutional provision now is that private property shall not be *taken or damaged*.

"The constitutional provision quoted is intended to regulate the exercise of the right of eminent domain," say the court, while the evident idea intended to be conveyed is that it is limited—this constitutional provision is limited to taking private property for public use by the exercise of the right of eminent domain or damaging private property for public use in the exercise of the right of eminent domain; in either case there must be just compensation.

Private property may be taken for public use, or it may be damaged for public use in the exercise of any governmental power, either legislative, executive or judicial, other than that of eminent domain, and the owner of the property so taken or damaged is remediless so far as getting "just compensation" for either taking his property or damaging it. The constitutional provision quoted is certainly intended to regulate the exercise of the right of eminent domain, but that is not its only purpose.

Here a street is graded and abutting property is damaged. When the city passed the ordinance to grade and graded this street, it did not exercise the right of

eminent domain as then generally understood by Bench and Bar.

It is said that "special assessments for local improvements are referable to and sustainable under the taxing power" (if sustainable at all).

In *Wells v. Weston*, 22 Mo. 384, it was the taxing power that took Wells' land contrary to or in violation of the Constitution.

In *St. Charles v. Nolle*, 51 Mo. 124, it was the taxing power that took private property for private use under the form of an exaction of a license tax.

In *Town of Cameron v. Stephenson*, 69 Mo. 372, at 378, the taxing power made the exaction and the Constitution rendered the act void as taking private property for private use.

In *City of St. Louis to use v. Allen*, 53 Mo. 44, the tax-law was constitutionally invalid as taking private property for public use without just compensation.

In *Higgins v. Ausmus*, 77 Mo. 351, Mr. Higgins' stoves were taken for a local sidewalk tax. The tax-law was invalid as taking his private property (his stoves) for public use without just compensation.

In *Pleasant Hill v. Dasher*, 120 Mo. 675, the local tax-law was held invalid as taking private property for public use without just compensation.

"If the state government possessed no authority over private property except that of taking it for the public use upon rendering the owner a just compensation, it would seem that, under this provision, the owner would be entitled to the full money value of his property without any deduction" (25 Mo. loc. cit. 263).

"This law (road law of 1845) is, indeed, nothing more in effect than the exercise of both powers of government in the same breath—that of taking the land by the right of eminent domain, and of requiring, under the taxing power, the adjacent landowners to contrib-

ute to the cost of it in proportion to the benefit each will derive from the road" (25 Mo. loc. cit. 264).

"It is evident that the advantages or benefits must have some limits" (25 Mo. loc. cit. 512). These benefits or advantages are limited by the Constitution to such as are special, peculiar, exceptive, not enjoyed in common with other property in the vicinity.

Although the last two cases involved the power of eminent domain and the tax-power, yet it was the tax power that took private property for public use without just compensation.

Continuing in *Keith v. Bingham*, the court, at page 306, say:

"If the taxing power has been called into play in the mode required by law [We suppose the court refer to a law in consonance with the Constitution] for the purpose of paying for a local improvement, such as paving or grading a street, it is no defense to a bill issued therefor to say, as is said here, that the street or the improvement damaged and did not benefit the property, though if such were the fact, the party injured might have his action (on a proper showing) under the Constitution for such injury. [*Householder v. City of Kansas*, 83 Mo. 488.] If the city had invoked the power of eminent domain unlawfully in the premises [But did the city invoke the power of eminent domain when it graded May street in Kansas City?] it could be held accountable therefor, but that would not interfere with the special tax-bill for an improvement regularly made under the taxing power. The right of action which a person might thus have against the municipality would constitute no just defense to the claim of the contractor who had made the improvement and to whom, under the law in question here, the tax assessment is payable."

The city did not grade this street (regularly or ir-

regularly) under the tax power. The court seem to be of the opinion that there may be an irregular exercise of the power of eminent domain when property is taken or damaged without payment in advance. The owner ought to be paid for his land, and payment should be made in advance. The writer is not disposed to deny that the city acts irregularly when it takes or damages private property for public use without payment in advance. The writer is not disposed to deny that the conduct of the horse thief is irregular. The court ought to recollect that the chief difficulty with the horse thief is his failure to pay the owner for the horse he stole from him. The court in quoting the Constitution of Missouri inadvertently omitted a portion of the provision in section 21 of art. 2: "And until the same [just compensation] shall be paid to the owner or into court for the owner the property shall not be disturbed;" the part omitted is, "or the proprietary rights of the owner divested."

The city charter provided for these tax-bills for grading streets; they were made liens on the abutting lots. In the event of failure to pay the tax-bills, the holder may sue the landowner, and under this decision it is no defense that the "improvement damaged and did not benefit the property." Then a judgment is rendered against the owner (not *in personam*) for the sale of the land (damaged and not benefited) to pay the cost of doing the work which damaged and did not benefit it. An execution is provided for by this statute and also a sheriff's deed conveying to the purchaser the title of the parties to the suit.

Are the proprietary rights of the owner therein then divested? The grading of a street here "damaged and did not benefit" the defendant's lot. Grading a street is not exercising the power of eminent domain. Grading a street is not an exercise of the power of tax-

ation. The improvement "damaged and did not benefit the property" taxed. This was the defense demurred to. The demurrer admits that "the improvement damaged and did not benefit" the property. The city charter and ordinance required a contract to be entered into for doing this grading, to be let to the lowest and best bidder. Here, then, is a contract to make an improvement (grading a street) which damaged and did not benefit defendant's land. No tax-bill is valid or of any force without this contract so provided for by this statute (city charter). Here, then, is this contract to grade this street (an improvement which damages and does not benefit this property) and thereby damage defendant's property—a contract to do that which the Constitution says shall not be done. The city enters into a contract to violate the Constitution. The contractor makes his agreement to violate the Constitution.

This Constitution was thought to mean that it prevented, first, taking private property, or second, damaging private property for public use without just compensation. This compensation for damaging as well as taking must be ascertained by commissioners or a jury. This just compensation for damaging as well as taking must be paid to the owner or into court for the owner before the owner's proprietary rights are divested. Here Bingham's property is damaged by this grading of the street. These damages are not ascertained by a jury or commissioners; they are not paid to the owner or into court for the owner and the court proceeds under this statute to enter judgment against the damaged lot, sell it and make a sheriff's deed therefor, and thereby divest defendant of his title to the damaged lot to pay the contract price for doing the damage in the interest of the public. The contractor makes a contract to grade the street, thereby damag-

ing private property for public use. "Just compensation" for such damage has not been made and is not expected to be made. By the Constitution the city is liable for damaging private property for public use just as much as it is liable for taking private property for public use. The contractor who thus helps the city to accomplish this constitutional wrong is not only exempt from all charges for damaging this property, but he has a legal claim to sell the abutting damaged land to pay his charges for doing this wrong—for violating the Constitution.

"Much latitude of discretion in exercising that power belongs to the legislative department, and the courts will not interfere with it unless there is some manifest abuse which is not claimed in this case." [S. C., 100 Mo. at 307.]

How much latitude of discretion are the courts to allow to the Legislature? The existence of this power does not depend on the extent to which it may be exercised. If the power exist at all, it must be exercised at the will of those in whose hands it may be placed. Courts ought not to be driven "to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use and what degree may amount to the abuse of the power." The power to withhold any portion of the "just compensation" for taking or damaging private property for public use, was never given expressly or by implication by way of taxation or otherwise, except in case of the special, peculiar, exceptive benefit which may be a part of the "just compensation" of the Constitution. A man may be paid in benefits as well as in cash. But the Legislature never had power to determine what is just compensation for land taken or damaged for public use, nor what part, if any, of this just compensation may be in benefits. It is no part of the legislative function of our government, State or National.

To grade a street and thereby damage private property for public use without just compensation for such damage, sell the damaged property to pay the cost of doing the damage, and by deed pass away the title of the owner is, according to this case, no abuse of this power (whatever it may be called). As a matter of idle curiosity, I wonder what would be an abuse of this power.

A power that does not exist can not be abused. Here is a positive constitutional prohibition. There is no express authority given to levy local taxes to pay for doing acts expressly forbidden by the Constitution. It is certainly not the intention of that Constitution that such power of local taxation should be implied.

The grading of this street did not benefit Bingham's property, says his answer, and the demurrer admits it. The cost of the grading may equal or exceed the value of the lot. The public grade this street and take the abutting property to pay for it. Judgment is rendered against the lot for the grading (not a benefit to the lot but a positive injury), execution issues, the lot is sold and a sheriff's deed is made conveying the title. The owner lost his lot. What did he get for it? The lot was not benefited. The case even admits it was damaged. Why not build a courthouse in the same way? Or a jail, or other improvement, such as a poorhouse? If the law had caused the sale of Bingham's St. Louis lot not damaged it would have been better. The vandalism of the act would have been lost.

In this case the contest arose under the Constitution of Missouri of 1875, providing that private property shall not be taken *or damaged* for public use without just compensation. If the land composing the street had belonged to Mr. Bingham as part of the lot taxed in the above case, and there had been a condemnation, then first, if the street had been a damage to Mr.

Bingham's remaining property, certainly that remaining property could not be taxed locally; second, if the street had been no benefit to the remaining property, it could not have been taxed locally; third, if the condemnation jury had found—if it was a fact (as admitted by this demurrer)—that the remaining portion of Bingham's lot was benefited generally in common with all other property in the vicinity, then the tax would be unconstitutional according to the repeated adjudications of the Supreme Court of Missouri. Nobody ever dreamed that this tax could be constitutionally laid if there was in fact a damage while a general benefit was insufficient and rendered the tax unconstitutional.

If the general benefit be wanting; if the special benefit be wanting; if in their stead a damage exists, the tax imposed would have been unconstitutional. This was the Constitution of Missouri prior to 1875 as interpreted by her Supreme Court. Now the Constitution is changed. Private property can not be taken *or damaged* for public use without just compensation. Private property can now no more be damaged for public use without just compensation than it can now or could before 1875 be taken for public use without just compensation. The owner shall not be disturbed; his proprietary rights shall not be divested.

In *Keith v. Bingham*, supra, the Missouri Supreme Court say:

"Much latitude of discretion in exercising that power [local taxation] belongs to the Legislature, and the courts will not interfere with it unless there is some manifest abuse," etc.

This means that the courts may interfere with the exercise of the legislative power, a power lodged in the legislative department of the government under the Constitution. The courts may judicially veto legislative acts enacted in strict conformity to the Constitu-

tion of the State and the Constitution of the United States.

In the exercise of this granted power "Much latitude of discretion is allowed." How much? Who shall determine this question of discretion in the exercise by the Legislature of its constitutional powers? Here we are, "Driven to the perplexing inquiry so unfit for the judicial department, what degree of taxation is the legitimate use and what degree may amount to the abuse of power." [*State v. North and Scott*, 27 Mo. 464 (A. D. 1858), at 479 bottom.]

"It is obvious that the same power which imposes a light duty can impose a very heavy one which amounts to a prohibition. *Questions of power do not depend on the degree to which it may be exercised.* If it may be exercised at all it must be exercised at the will of those in whose hands it is placed. The question is, where does the power reside, not how far it will probably be abused? and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence. When we are inquiring whether a particular act is within this prohibition the question is, not whether the State may so legislate as to hurt itself, but whether the act is within the words and mischief of the prohibitory clause." [*Brown v. Maryland*, 12 Wheaton 439, quoted in *State v. North and Scott*, 27 Mo. 464, at 480.]

The same power which imposes a very light local tax may impose a very heavy local tax.

Here are two express limitations on the power of the State: First private property shall not be taken for public use without just compensation; second, private property shall not be damaged for public use without just compensation. Of what avail is this *express* limitation of power if the *implied* power to tax can nullify it? The State takes or damages the citizen's prop-

erty with one hand and with the other hand takes by local taxation that citizen's money to pay for it. The State freely gives this just compensation for damaging or taking and then pays the owner by taxing his just compensation one hundred per cent. The courts imply a power in one part of the Constitution which nullifies an express limitation or restriction in another part of that Constitution.

With the left hand of eminent domain the State delivers to the owner of real estate taken or damaged "just compensation" for such land taken or damaged for public use, and with the right hand of local taxation may take the whole sum to pay it. The State can not take the land under the power of eminent domain without paying value for it, but the State can take the whole value under the power of taxation even if the work for which the tax is levied be a damage. Such is the extraordinary power of this "constitutional road agent." Say the Supreme Court of Missouri in *City of St. Louis to use v. Allen*, 53 Mo. 44, at 55:

"It may be said that the property may not be sufficient to pay the assessment; it is a sufficient answer to this to say, that it will not be presumed, that it was ever intended that a corporation in the exercise of this high prerogative should absorb the whole value of a person's property and then come on him for the deficit. The very idea of such an assumption on the part of either the city, or the state Legislature, would be sufficient to startle one who had even the most crude notion of the objects and purposes of a just or enlightened government. The idea that a city could improve a street, and assess the property benefited thereby [how about the property damaged for which damage no redress could be had at this time (A. D. 1873)] and sell the entire property, and then go on the owner of the property, who may reside out of the city and sell

his property there to pay the balance of the assessment, and this all in consideration of the benefit [notice the benefit is assumed not proved] conferred on his property, which was already sold, would seem in its results like *taking the property of the owner and converting it to public use without any just compensation. I do not believe that by this indirection you can do that which is forbidden by the Constitution if directly done. If a personal judgment can be rendered in such case, all this may happen. It is true, it is not likely to happen, but the fact that it may possibly happen is enough to condemn the law.*"

It may possibly happen that abutting property will be damaged by work done on the street in front of it and then the vandalism is apparent in selling damaged abutting property to pay the cost of doing the damage in place of selling distant property not damaged by the work.

The reader will note that this first case is one for grading a street; a local tax for such grading. "The damage resulting, by causing the plaintiffs to rebuild or prop up their falling walls is consequential, and as it is a consequence of the exercise of a power granted by the State to municipal corporations, for public purposes, and the power has not been abused, but skillfully and discreetly exercised, the city authorities are not responsible." [*Taylor v. St. Louis*, 14 Mo. 20, at 24.] "The damage resulting," say the court. Then there *was* damage. Taylor's property was damaged. But it was "*damnum obsque injuria*," still it was "*damnum*." That damage is forbidden now; it was not then. This was the very thing the Constitution of 1875 aimed to prevent. Streets were graded and houses left high up in the air and all access to the street cut off, a result absolutely ruinous to the landowner. He could not get to or from his house. He had a property right

in the street different from the public right, the right of ingress and egress to and from his own house. This right was injured or destroyed without payment of anything for it. His property was seriously damaged. What is a house in town worth if you cannot get to it?

The provision of the Missouri Constitution of 1875 is, that private property shall neither be taken nor damaged for public use without just compensation. If a city can grade a street and leave a house on abutting land high up in the air and cut off all means of ingress and egress and thereby damage the property—if a city can do this and not be guilty of a violation of this constitutional provision as to damaging private property for public use, the writer is at a loss to know where to search for such a case. The Topeka bonds to aid manufacturers in Topeka (*Loan Association v. Topeka*) were without authority because the power to tax was wanting. If Topeka made any bond then she must pay it. To pay the bond she must tax. If Topeka taxes her people it must be for a public purpose. Inducing manufacturers to come to Topeka and there establish their plants by voting bonds to them is not within the bounds of legislative power. But according to *Keith v. Bingham*, 100 Mo. 300, a tax to pay these bonds would have been valid, and would have been enforced. An implied want of authority to tax defeated the Topeka bonds. An express want of authority to tax, a prohibition to grade the street, sustained the tax in *Keith v. Bingham*. To put the case on a bare want of authority is too weak. The city made a contract prohibited by the Constitution, viz., a contract to grade this street which the record admits “damaged and did not benefit” Bingham’s property, and the answer demurred to states that no compensation for such damages were ever paid to Bingham or any one. “No compensation was made or tendered to or paid into court

for any person as the owner of said lot on account of said damages" (100 Mo. at 301). Here the city made a contract to grade this street and to pay for it. How it was to be paid for is immaterial. The contract was to pay. Here is a positive constitutional prohibition against doing the thing contracted to be done. Yet the city levies the special tax to pay for doing this prohibited work, and here the city enforces collection of the tax.

Suppose Topeka had levied a tax to pay those bonds to aid private enterprises, looking at the reasons given and the decision and opinion rendered, would the court have enforced the tax while it, the court, denied judgment on the bonds? Cities and towns are prohibited from becoming indebted to an amount exceeding five per cent of the assessed value of the property of the city or town. Can a city or town issue bonds to the extent of fifty per cent of its taxable property and then levy a tax to pay such bonds and enforce the tax while the bonds to be paid by such tax are prohibited by the Constitution? The court use this language, page 306:

"If the taxing power has been called into play in the mode required by law for the purpose of paying for a local improvement, such as paving or grading a street [Here it was grading], it is no defense to a bill issued therefor to say as is said here that the street or improvement damaged and did not benefit the property though, if such were the fact the party injured might have his action (on a proper showing) under the Constitution for such injury."

The party injured may have his action for the injury. But here the injury was done; an injury forbidden by the Constitution. This injury was done by contract and now the proposition is to tax the injured property to pay the cost of doing the injury to it and call on the courts to enforce the tax against the injured

property. Here the street in front of a home is graded and the home is left high up in the air and wholly inaccessible; the property is damaged thousands of dollars; time and labor were involved in grading this street; now the proposal is to tax this injured property to pay the cost of doing this forbidden damage. The injury is admitted and the tax to pay the cost of doing it is enforced. The injury to the property is forbidden by the Constitution. Whoever owns this injured property must pay the cost of the fiendish vandalism that did the injury. This tax was originally called a tax on benefits, or for benefits; now it is a tax on the injured property for the injury done to the injured property-owner. At one time a tax to pay the cost of a public improvement that was a general benefit to the property was unconstitutional; now it is constitutional if it is a tax for doing a work which ruined the property. The injured property is taxed to pay some one for doing that injury. Municipal bonds were valid only in the hands of a purchaser for value without notice. The local taxbill is valid in the hands of the original wrongdoer.

The defense to which a demurrer was sustained is in the words and figures following, viz.:

"Defendant for a third defense to the tax-bills, sued upon, states that the lot described in plaintiff's petition is now and was at all the times stated in plaintiff's petition, private property. That the grading mentioned in plaintiff's petition was done for public use and damaged and did not benefit said lot. That no compensation was made or tendered to or paid into court for any person as the owner of said lot on account of such damages. Wherefore the defendant asks judgment." [Ib., 301, at bottom.]

The court at page 307 say as to this defense:

"The third defense in the answer is otherwise insufficient. It does not allege that the defendant was the

owner of the land when it was damaged as claimed. In the absence of such allegation no defense would exist, even under defendant's theory of the purport of the constitutional provision relied on. We have recently held that such damages are a personal claim of the owner of the property *at the time of the injury* and that they do not run with the land. [*Hilton v. St. Louis*, 99 Mo. 199.] Hence, in any view taken of the answer, the ruling of the trial court on the demurrer to it was correct."

The court, it seems to the writer, erred in considering the defense as in the nature of a counterclaim or a confession and avoidance whereas it is in fact in the nature of a traverse, a denial of the validity of the tax on the ground that it is illegal—unconstitutional and the facts are set out constituting its illegality—its unconstitutionality. It is on its face intended as a denial of all authority for the tax in suit, rather a prohibition to act and then tax for the prohibited act. If it were intended as in the nature of a counterclaim for damages for injuries to this property, then the defense is certainly defective in all respects indicated in the opinion and in many more. If the property injured did not belong to the defendant at the time of the injury, and if such damages were not assigned to defendant, then certainly such defendant would not own such damages or "just compensation," and for that reason could not get judgment for what did not belong to him. Defendant could not recover from the plaintiff "just compensation" for damaging a stranger's land, or land not his own.

Again, the injuries alleged are not alleged to have been done by the plaintiff, and hence, a counterclaim against him could not be sustained. If it were a counterclaim for injuries done in a transaction out of which the tax-bill sued on originated, and if the plaintiff

were liable for the injuries complained of, the amount of damages is not stated. The court certainly were not bound to render judgment against the plaintiff when the counterclaim did not ask it or state the amount of the damages, or ask judgment against any one for any amount.

The language of the court assumes this to be the constitutional law of the State. Mr. Jones owns a lot abutting on the street. The street is graded and Jones' house is left high up in the air; all access to it is cut off. His property is damaged to the extent of eighty per cent of its value before the grading. Jones, without paying for the grading, sells the lot to Bingham. Damages resulting from grading are not sold to Bingham. Facts like these are admitted by the demurrer. "The grading damaged and did not benefit the said lot. That no compensation was made or tendered to or paid into court for any person as the owner of said lot on account of said damages," either Jones or Bingham. The property was damaged for public use; the owner got nothing for such damaging and then the damaged lot is taxed to pay the damage and that tax to pay that damage which the Constitution prohibited—that tax is enforced in this suit. A power is implied (certainly not conferred in terms) in the Constitution to levy a local tax for an act absolutely prohibited. The Constitution says that lot shall not be damaged for public use without just compensation; that just compensation shall be ascertained by a jury or commissioners. Until this just compensation shall be paid to the owner or into court for the owner, the owner shall not be disturbed. But here he was disturbed; the street in front of his house was graded or cut down; his house was left high up in the air. You have disturbed that owner when the Constitution said you should not. Can you tax locally the damaged landowner or his lot and house

to pay for doing this forbidden act? If the lot had been taken for public use, could the lot thus taken or other lots of the owner be taxed to pay for the forbidden taking? No person shall be deprived of life, liberty or property without process of law. A person is deprived of property without due process of law; can you by implication tax locally his property to pay for the forbidden act?

In *Loan Association v. Topeka*, 20 Wall. 655, and in *Cole v. LaGrange*, 113 U. S. 1, there was a mere want of authority to tax. Here is a constitutional prohibition. The property was damaged whether Bingham owned it or some one else owned it. The public proceeded to disturb the owner of that property, whether Bingham or Jones can make no difference. The Constitution of the State prohibited that disturbance. Can the State tax the damaged property for the cost of the damage when the Constitution prohibits the damage in clear express terms? The property-owner shall not be disturbed. The city disturbs the property-owner and taxes him to pay for the prohibited disturbance. The plea was that of the want of authority. The decision was that the city had authority to tax locally for doing what the Constitution prohibited it from doing and the tax was enforced.

The reader will notice that the clause of the Constitution in question is restrictive in character. It forbids certain things to be done. These restrictions—these limitations on the powers of the government—need no legislation to enforce them. The courts have considered that question under the present Constitution of Missouri. The first case to be noticed is that of the *St. Joseph Board of Public Schools v. Patton et al.*, 62 Mo. 444, et seq., decided at May term, 1876, under the Constitution adopted November 30, 1875.

The Board of Public Schools under acts of March

3, 1866, and March 20, 1872 (its incorporation acts), had power to make estimates for salaries of teachers and expenses of the schools and for building school-houses, and the board were required to report this amount to the county court, and thereupon the court were required to make such levy on all taxable property in the district, but the levy could not exceed seven mills on the dollar. The Constitution had gone into effect November 30, 1875, and under its provisions only four mills could be levied, except that this rate might be increased to sixty-five cents on the \$100 valuation by a vote of the taxpayers, under acts of the Legislature to be passed. The Legislature had passed no law on the subject. The county court levied only four mills, the constitutional limit; the court refused to make any further levy and the board brought mandamus proceedings against the judges of the county court asking them to be compelled to levy seven mills—three mills more than the Constitution permitted. The court at page 448, et seq., say:

“In the first part of section 10, the constitutional rates of taxation for county, city, town and school purposes are fixed. The provisions above quoted allow certain modifications of these rates. The question then is, must the rates of taxation fixed in the Constitution, when accompanied with provisions in that instrument authorizing their modification, await the action of the Legislature to provide the means of obtaining such modification before the rates themselves go into operation?

“The fifteenth section of the schedule to the Constitution declares that ‘The General Assembly shall pass all such laws as may be necessary to carry this Constitution into full effect.’ There is no way of enforcing this injunction on the Legislature. Under our system of government there is no power to compel the leg-

islative department of government to make laws. Constitutions may restrict legislative powers, and declare what laws shall be valid; but from the very nature of legislative power, its exercise in a particular case must depend upon the volition of the Legislature. Responsibility to constituency, and a sense of public duty, are the only incentives which can prompt legislative action.

“In the first Constitution of this State, adopted on its admission into the Union, and in the succeeding one, adopted in 1865, the General Assembly was directed to provide by law a mode of suing the State; yet it is well known that for upwards of fifty years this mandate was disregarded, and no one ever suggested that it could be enforced, unless it was the pleasure of the Legislature that it should be.

“If, then, the rates of taxation declared in the eleventh and twelfth sections of the tenth article of the Constitution depend for their enforcement upon the legislative department of the government, they are mere abstractions, mere declarations of the opinion of the convention which framed the Constitution, entitled of course to such weight as the opinions of so able and respectable body necessarily possesses, but effecting no constitutional barriers against legislative extravagance or constitutional assurances of retrenchment in public expenditures and taxation consequent thereon.

“The convention were doubtless aware of their inability to coerce the legislative department into the enactment of laws, which in the opinion of the convention were desirable, and therefore, declared certain rates and limits of taxation as the constitutional limits and rates, providing at the same time a mode by which the Legislature and the people might exceed them if they saw fit. *Any construction, which makes these constitutional restrictions dependent on legisla-*

tive action, destroys their vitality. The Legislature may not see proper to pass any laws affording an opportunity to the voters to increase the school tax to one per cent in cities and towns, and .65 of one per cent in county school districts; and if it is conceded that the restriction to four mills on the dollar needs legislation to enforce it, because the process by which this rate of taxation may be increased does, then in the absence of any legislation there is no limit and these provisions of the Constitution are lifeless. After the 1st of July, 1877, the laws inconsistent with them are repealed; but if no legislation occurs, and the position that legislation is needed to enforce the restriction is a correct one, then both the restriction and proviso are inoperative, and the Legislature may regulate the rate of taxation at their pleasure.

“The Legislature already possessed the power of limiting taxation to the maximum adopted in the Constitution; but it was not the object or intention of the framers of the Constitution to leave these limits to legislative discretion; but to declare constitutional limits which, until removed in the mode pointed out in the Constitution, should prevail on its adoption. If the Legislature and the people desire to increase this rate, a mode is provided by which it may be done, but until this is done the constitutional limit prevails.

“The provision of the Constitution required no legislation to enforce it, and therefore on the adoption of the Constitution went into effect. The proviso by which a mode was appointed to alter it to a certain extent, and which depended on legislative action, does not prevent the restriction from going into effect.”

The writer is aware of the numerous decisions that the whole of article 10 of the Missouri Constitution of 1875 does not include, and was not intended to include, special assessments or local taxes for work

done in front of the property. The power is the power of taxation, and it is not restricted *eo nomine* as taxation in article 10. But the question is, Should the courts imply a power in the Legislature to levy a local tax on injured property for doing an act (injurious to that property) prohibited by the Constitution? Here we have a constitutional provision that private property shall not be taken or damaged for public use without just compensation. Is this a restriction in and of itself, or does it require legislation to enforce it?

In *Householder v. City of Kansas*, 83 Mo. 488 (A. D. 1884), in rendering the opinion the court at page 492, bottom, say:

"Prohibitory clauses in considerations are generally self-enforcing; twenty sections of the second article of our Constitution, *including the one under consideration, are prohibitory and on examination all or nearly all of them will be found to effect their purpose without the aid of legislation. The things therein named are prohibited. A legislative enactment could not do more toward the invalidation of the prohibited acts.* It might provide penalties for breaches of a prohibitory constitutional provision where the Constitution itself provides none. For instance, no act of the Legislature could make it any more illegal to take money from the public treasury in aid of any church. The General Assembly might impose a penalty or other punishment for the act of taking money from the public treasury in aid of a church, but without any such legislation the courts would, under section 7, article 2, of the Constitution, hold the act illegal and the person so taking the money responsible for it." But in the case under consideration the contractor who does the damage to private property, prohibited by the Constitution, is not only not responsible for it as a wrongdoer, but the statute gives him a lien on the injured property for his wrong-

ful injurious act. For this prohibited injury the city has the implied power to tax locally the injured property to pay for the work and material used in doing the prohibited injury.

Further in same case, page 494, the same court say:

“By its charter the city of Kansas has authority by condemnation proceedings or otherwise to acquire and hold property to be used as streets and alleys and to change and alter the grades of streets. Under section 21, the city can no more alter or change the grade of a street to the damage of a lot abutting upon it, without compensation to the owner, than it can take private property for public use without compensation to the owner. The provision in relation to the ascertainment of such compensation applies equally to the taking and damaging of property. Will it be contended, until the Legislature shall have enacted a law prescribing the mode for the ascertainment of the compensation to the owner, a municipal corporation can seize and appropriate his property and that he would be without remedy against the corporation? That a city for the purpose of repairing its streets and bridges may enter upon the property of a citizen and cut timber and quarry stone without incurring any liability whatever? *Is this important constitutional provision to protect the citizen in his rights of property a dead letter or a living principle at the pleasure of the Legislature? Can the Legislature by mere inaction nullify and set it aside?*”

Private property shall not be taken for public use without just compensation, is an absolute prohibition. Private property shall not be damaged for public use without just compensation, is likewise an absolute prohibition. No legislation is needed to enforce either prohibition. Until this just compensation shall be paid to the owner he shall not be disturbed; his proprietary

rights shall not be divested. Here are positive prohibitions; no legislation is needed to complete the prohibitions. With this constitutional law thus laid down read again the opinion in *Keith v. Bingham*, at page 306:

“If the taxing power has been called into play in the mode required by law for the purpose of paying for a local improvement, such as paving or grading [this tax-bill was for *grading* May street], it is no defense to a bill issued therefor to say, as is said here, that the street or improvement damaged and did not benefit the property though, if such were the fact, the party injured might have his action (on a proper showing) under the Constitution for such injury. [*Householder v. City of Kansas*, 83 Mo. 488.] If the city had invoked the power of eminent domain unlawfully in the premises it could be held accountable therefor, but that would not interfere with the collection of the special taxbill for an improvement regularly made under the taxing power. The right of action which a person might thus have would constitute no just defense to the claim of the contractor who had made the improvement, and to whom under the law here the tax assessment is payable.”

“The nature of these special taxes has been already so fully explained by judicial decisions in this State that little that would be new could now be added.” Very apparently the court has said something very new. It is no defense that the grading damaged the lot. The Constitution prohibited such grading or any other act that would damage the lot. The injured party has a right of action for the injury done, but he is compelled by local taxation to pay the cost of such injury. It is a most singular law, under a most singular Constitution, that compels a person to injure his own property for public use or pay others for injuring it.

Here in our Constitution are certain absolute restrictions not needing legislation to enforce them: First, private property shall not be damaged for public use without just compensation (Bingham's private property was damaged for public use without just compensation). Second, such compensation shall be ascertained by a jury or commissioners. That was not done. If there was no law providing for jury or commissioners, still the prohibition remained absolute. The Legislature could not repeal the law providing for condemnation cases and then take property for public use without paying for it, in the face of the constitutional prohibition that needs no legislation to enforce it. If there were a law enacted by the Legislature by which just compensation for damaging private property for public use could be ascertained, the Legislature could not repeal such law and then damage property at their will and pleasure. Third, until this just compensation for damaging private property for public use shall be paid to the owner the property shall not be disturbed. Here is an absolute prohibition. It don't need legislation to enforce it. Bingham, the owner, was disturbed. The property was disturbed. It can not be said that property which is damaged by an act is not disturbed, by that act. Although damaging this property was positively prohibited by the Constitution, yet it was not only damaged contrary to such positive prohibition not needing legislation to enforce it, but the owner of that property must pay a local tax for doing the prohibited act which occasioned that prohibited damage.

And the courts solemnly tell us that the constitutional reason for such a tax is that it is constitutional to assess the cost of this work on "*benefited*" property. It *must* be a benefit for they can not damage it; it is against the Constitution to do so. In a state case under an indictment for larceny of a horse, the plea be-

ing not guilty, defendant argued he could not steal a horse; the law prohibited it; the act he did was an absolute nullity; no defendant should be sent to the penitentiary for doing an act which was an absolute nullity. That defendant should have been discharged—and he certainly would have been if he had been a contractor for city work. And not only that, the court would have given him a lien on the stolen horse to pay the expenses of his roguery. Taking private property for public use without the owner's consent and without paying for it, is just as much prohibited by the Constitution as taking a horse for private use without the owner's consent and without paying for the horse, is prohibited by the statute. One is absolutely prohibited by statute law; the other is absolutely prohibited by the Constitution. Absolutely nothing further is needed in either case except to steal the town lot in one case and to steal the horse in the other. Damaging private property for public use without the owner's consent and without paying for it is just as much prohibited by the Constitution as taking private property for public use without the owner's consent and without paying for it.

In the case of taking the lot for public use without the owner's consent and without paying for it (stealing it), the owner may maintain ejectment and thus recover his taken (stolen) lot and the owner of the horse may maintain replevin for his taken (stolen) horse. The lot is damaged; the horse is damaged. The damaged lot is charged with a lien for the cost of the damage. Why not charge the damaged horse with a lien for doing that damage? The Constitution was intended to prohibit vandalism. A debt exceeding five per cent of the assessed value of property is prohibited. Can a debt of one-hundred per cent be created and then levy a tax to pay the prohibited debt? In the Topeka case

and in the LaGrange case there was a mere lack of authority to tax; there was a mere lack of authority to issue the bonds. Here the debt is prohibited. There is a difference between a want of authority and a prohibition.

The grading was completed before the tax was levied. Before a street can be graded this damage must be paid. The damage was complete before payment. After performing this act of damage, instead of paying Bingham the admitted damage, they levied a tax on his property injured by this grading. The Constitution demands that before property shall be taken or damaged, just compensation shall be ascertained by commissioners or a jury and paid to the owner or into court for the owner. The Constitution never contemplated that the property-owner, in order to get this "just compensation," should be compelled to employ and pay a lawyer and be at the expense and annoyance of the lawsuit to get that which the Constitution provides shall first be paid to him or into court for him.

In *Keith v. Bingham*, 100 Mo. 300, the contract to grade, we presume, was in the usual form to grade a public street for public use. The case admits the two facts, that the grading damaged the property, and that just compensation for such damaging of this property for public use had never been paid to the owner or to anyone. How can this contract to violate the Constitution be valid and form the basis of a lien on real estate and its ultimate sale to pay it? Loan office "certificates" were involved in *Craig v. Missouri*, 4 Peters 410, et seq. The tax-bill should have no more validity than the promissory note given in that case for "loan office certificates" received by the makers of the note and the loan office certificates endorsed to others. "Is the note valid of which they form the consideration," asks the court by Marshall, C. J., rendering the major-

ity opinion? [4 Peters loc. cit. 436.] May we not ask, "Is this tax-bill valid, founded on this contract and doing the work under it which work damaged this land! The loan office certificates did not damage the person to whom they were given; they were simply worthless. Here the tax-bill is founded on a contract which causes damage to the landowner—a damage forbidden by the Constitution. If the work had been harmless—no benefit—the note would have been void, but here the tax-bill is valid when the work for which it was given is a damage forbidden by the Constitution. Continuing the court say:

"It has been long settled, that a promise made in consideration of an act which is forbidden by law is void. It will not be questioned that an act forbidden by the Constitution of the United States, which is the supreme law, is against law. Now the Constitution forbids a State to 'emit bills of credit.' The loan of these certificates is the very act which is forbidden. It is not the making of them while they lie in the loan offices but the issuing of them, the putting them into circulation, which is the act of emission; the act which is forbidden by the Constitution. The consideration of this note is the emission of bills of credit by the State. The very act which constitutes the consideration is the act of emitting bills of credit, in the mode prescribed by the law of Missouri, which act is prohibited by the Constitution of the United States."

The consideration of the note was harmless. There was no consideration, but the reader must remember that these certificates did not harm the person to whom they were issued. (The case is reported in 1 Mo. 452, Jackson District, May term, 1824, under the title of *Mansker Graves and Simpson v. The State*.) This contract of loan and promissory note did not harm the maker of the contract—the note in suit. But the grad-

ing contract and its execution damaged the lot and if the act had been done by the State as it well might have been done, the real estate owner would be bound to suffer the damage forbidden by the Constitution and, in addition, he must pay the cost of doing such forbidden damage or lose his property. The courts imply a power to levy a local tax to pay the cost of a forbidden act. Why can't the Legislature pass any other act violating any other restriction in the Constitution and then specially tax the injured person or property to pay for the forbidden act? And yet this is done under a Constitution which prohibits taking or damaging private property for public use; the property shall not be disturbed nor the title be divested until the money is paid to the owner or into court for him. "The section of the Constitution just quoted refers to and is intended to regulate the exercise of the right of eminent domain."

"Is the proposition to be maintained that the Constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the Constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing? We cannot think so." [Marshall, C. J., in *Craig v. Missouri*, 4 Peters, at 433.]

"The section of the Constitution refers to the power of eminent domain," says the opinion in *Keith v. Bingham*. The language of the Constitution is very general: "Private property shall not be damaged for public use," etc. It was the street grading which damaged Bingham's property, not the tax. The grading would have caused the same damage if there had been no special tax-bill or general tax. The tax-bill

did not increase or decrease the damage done by the grading. The tax-bill did not increase or decrease the benefit. The city did the grading. It may have been done by days' work, or the street force, or the chain gang, or other involuntary servitude in punishment for crime, or by contract to the lowest bidder. The grading caused the damage. This injury was called, prior to 1875, "*damnum absque injuria*." It was still "*damnum*." The Missouri Constitution of 1875 meant to prohibit this "*damnum*." After the street was graded and the damage done, the tax-bills can not be regarded as an apology for the wrong done; they cannot wipe away all the tears nor assuage all the pain, nor can the tax-bills convert a \$2,750 damage, as ascertained by court and jury (128 Mo. 23), into a \$300 benefit (67 Mo. App. 205).

Continuing in *Craig v. Missouri*, 4 Peters 433, Chief Justice Marshall, rendering the opinion of the Supreme Court of the United States, says:

"But it is contended that though these certificates should be deemed bills of credit, according to the common acceptance of the term, they are not so in the sense of the Constitution, because they are not made a legal tender. The Constitution furnishes no countenance to this distinction. The prohibition is general. It extends to all bills of credit, not to bills of a particular description. That tribunal must be bold indeed, which, without the aid of other explanatory words, could venture on this construction. It is the less admissible in this case, because the same clause of the Constitution contains a substantive prohibition to the enactment of tender laws. The Constitution, therefore, considers the emission of bills of credit and the enactment of tender laws, as distinct operations, independent of each other, which may be separately performed. Both are forbidden. To sustain the one, because it is not also

the other; to say that bills of credit may be emitted if they be not made a tender in payment of debts, is in effect to extinguish that distinct, independent prohibition and to read the clause as if it had been entirely omitted. We are not at liberty to do this." [Marshall, C. J., in *Craig v. Missouri*, 4 Peters, at 433, bottom, and 434.]

Taking private property for public use and damaging private property for public use are two distinct acts. Both are equally prohibited, the one no more so than the other. A damaging was not a taking. This was the reason for the change in the Constitution. Now "just compensation" is required in both cases. And "just compensation" is to be settled by court and jury or commissioners. The questions that come up are, What is just compensation? How much? Is this a taking? The court must settle that. The power that takes cannot settle that fact and bind the property-owner in court. Is this a public use? This is a question for the court. The Legislature cannot settle that question and bind the property-owner in court. Is this property damaged, and if so how much? This is a question for court and jury or commissioners. The Legislature cannot settle it and bind the property-owner. The state constitutions disclose no such intention. Is this property benefited, and if so how much? Here are questions likewise for court and jury, certainly not for the Legislature. The power that determines damages, determines benefits. If in passing an ordinance to grade a street the legislative power determines the benefits, then there is nothing for the Constitution to operate upon. In one case, court and jury determine just compensation for damaging at \$1000, holding that there is a damage, while the Legislature determine that this is a \$1000 benefit. Which shall control? Here is an irrepressible conflict. There can be no middle ground. In

Craig v. Missouri, 4 Peters, supra, at 436, the court per Marshall, C. J., continuing, say, as quoted before:

“The certificates for which this note was given, being in truth ‘bills of credit’ in the sense of the Constitution, we are brought to the inquiry: Is the note valid of which they form the consideration? It has been long settled, that a promise made in consideration of an act which is forbidden by law is void. It will not be questioned, that an act forbidden by the Constitution of the United States, which is the supreme law, is against law. Now the Constitution forbids a State to ‘emit bills of credit.’ The loan of these certificates is the very act which is forbidden. It is not the making of them while they lie in the loan offices; but the issuing of them, the putting them into circulation, which is the act of emission; the act that is forbidden by the Constitution. The consideration of this note is the emission of bills of credit by the State. The very act which constitutes the consideration, is the act of emitting bills of credit in the mode prescribed by the law of Missouri; which act is prohibited by the Constitution of the United States. Cases which we cannot distinguish from this in principle, have been decided in state courts of great respectability; and in this court.

“In the case of the *Springfield Bank v. Merrick et al.*, 14 Mass. Rep. 322, a note was made payable in certain bills, the loaning or negotiating of which was prohibited by statute, inflicting a penalty for its violation. The note was held to be void. Had this note been made in consideration of these bills, instead of being made payable in them, it would not have been less repugnant to the statute; and would consequently have been equally void.

“In *Hunt v. Knickerbocker*, 5 Johns. Rep. 327, it was decided that an agreement for the sale of tickets in a lottery, not authorized by the Legislature of the

State, although instituted under the authority of the government of another State, is contrary to the spirit and policy of the law, and void. The consideration on which the agreement was founded being illegal, the agreement was void. The books, both of Massachusetts and New York, abound with cases to the same effect. They turn upon the question whether the particular case is within the principle, not on the principle itself. It has never been doubted, that a note given on a consideration which is prohibited by law, is void. Had the issuing or circulation of certificates of this or of any other description been prohibited by a statute of Missouri, could a suit have been sustained in the courts of that State, on a note given in consideration of the prohibited certificates? If it could not, are the prohibitions of the Constitution to be held less sacred than those of a state law? It had been determined, independently of the acts of Congress on that subject, that sailing under the license of an enemy is illegal. *Patton v. Nicholson*, 3 Wheat. 204, was a suit brought in one of the courts of this district on a note given by Nicholson to Patton, both citizens of the United States, for a British license. The United States were then at war with Great Britain; but the license was procured without any intercourse with the enemy. The judgment of the circuit court was in favor of the defendant; and the plaintiff sued out a writ of error. The counsel for the defendant in error was stopped, the court declaring that the use of a license from the enemy being unlawful one citizen had no right to purchase from or sell to another such a license, to be used on board an American vessel. The consideration for which the note was given being unlawful, it followed of course that the note was void. A majority of the court feels constrained to say that the consideration on which the note in this

case was given, is against the highest law of the land, and that the note itself is utterly void.”

The case of *Kansas City ex rel. Diamond Brick and Tile Co. v. Shroeder et al.*, decided in the Supreme Court of Missouri on March 29, 1906, rehearing denied May 22, 1906, is another case, showing the revolutionary tendencies of modern judicial opinions on questions of local taxation. [196 Mo. 281; Southwestern Reporter, vol. 93, page 405, et seq.] The suit is against the contractor and sureties on his bond given to pay for labor and materials used under his contract with Kansas City. The contention of the sureties was that the ordinance was void, as also the contract between the city and contractor, and also the contract with the sureties. The contract comes up under section 12, article 17 City Charter of Kansas City, pages 234-5, which is in these words:

“Sec. 12. *Public improvements—Contracts—Lowest and best bidder—Repair by day’s work.*—All city improvements of whatever kind or character, including the erection of all public buildings, made or to be erected at the expense of the city, and including all work to be paid for in special tax-bills, except as in this charter otherwise provided, shall be let by contract to the lowest and best bidder as shall be prescribed by ordinance; provided, however, that nothing in this section shall be so construed as to prevent repair by day’s work of streets, alleys and other public places, curbing, sewers, culverts, buildings or other city property, so far as may be necessary, under the direction of the board of public works.”

All city improvements (including work to be paid in tax bills) shall be let by contract to the lowest and best bidder. Other methods are prohibited “Wherefore every statute that limits a thing to be done in a particular form although it be spoken in the affirmative, in-

cludes in itself a negative, viz., that it shall not be done otherwise." [*Stradlung v. Morgan*, Plowden 198b, at 206a, near bottom (A. D. 1560).]

All city improvements shall be let by contract to the lowest and best bidder. Here is an implied negative that the public improvements shall not be let otherwise than, first, by contract, and second, to the lowest and best bidder. Other methods are prohibited. Open competition is the rule enjoined by this statute. Monopoly is prohibited. What is implied in a statute is as much a part of it as what is expressed. Is "form" sacred and "substance" to be disregarded by the legislative power at its mere will and pleasure?

In *Kansas City v. Shroeder* (S. W. Rep., vol. 93, No. 2, page 405), the ordinance provided that the street should be paved with "Diamond vitrified paving brick;" one corporation owned exclusively the material (it was not a patented material where the law created the monopoly). The ordinance is so framed as to exclude competition on the material brick. It may add a like restriction as to sand and cement. It may on the same principle provide that one class of workmen shall be employed and all others excluded. In short, the ordinance may totally nullify the charter provision as to letting work to the lowest and best bidder by so providing in the ordinance that one man only can furnish part or all of the material. The city charter, the statute law, requires this work to be let to the lowest and best bidder. May a city ordinance dispense with this necessary requirement of the city charter and still be held valid by the courts? Can the city council do indirectly that which it is prohibited from doing directly?

In *City of St. Louis v. Davidson*, 102 Mo. 149, the act done was not prohibited; it was a mere want of authority. Say the court at page 153:

“It will have been observed that the charter of the city while it does not permit, yet it does not *prohibit* the making of such a contract as the one before us, so that although the contract is *ultra vires* the corporation, yet it is not illegal because not *prohibited* by the charter. This is a distinction clearly marked out by the authorities. [2 Dillon Mun. Corp. (4 Ed.), sec. 936; *Macdonald v. Mayor*, 68 N. Y. 23; Bigelow on Estop. (5 Ed.), 685.]”

A. engages B. to steal horses and bring them to him to dispose of, and A. promises to pay half of what is realized from such sales of such stolen horses. Stealing horses is prohibited. Is the contract to steal valid? The contract to steal is just as much prohibited as the stealing. A contract to murder is just as much prohibited as murder. In either case can either party to the contract to do the prohibited thing, have specific execution in equity or maintain a suit at law for damages?

In *Kansas City v. Shroeder*, 196 Mo. 281, S. W. Rep. at 409, the Supreme Court of Missouri say:

“The contract between the materialmen and the contractor is *independent* of the contract between the city and the contractor. Therefore the relief to which the materialmen are entitled does not depend upon the contract between the city and the contractor, but upon that *between them and the contractor*. The fact, therefore, that the contract between the city and the contractor may be invalid, can have no effect upon the contract between the materialmen and the contractor.”

The two contracts are not independent. One is part and parcel of the other. The contract between the city and the contractor requires material and labor. The materialman and the contractor have a contract for the material to be used by the city contractor in doing the city work. This is a suit on the contractor's bond to pay for the brick used and required under this

ordinance and contract without competition in violation of the statute, the city charter. This is the very thing the charter prohibited. If the contract had been a mere sale of brick by the owner to the contractor, without any reference to the purpose for which the brick are to be used, the case would be different. There is no prohibition on the sale of brick generally.

Here Kansas City violated the city charter. All public improvements must be let by contract to the lowest and best bidder. The ordinance nullifies this provision of the charter. The board of public works and the city engineer in advertising that this work will be let to the lowest and best bidder, cannot say to proposed bidders that this work shall be done with Diamond vitrified brick or any other brick just as good. The board of public works and the city engineer could not under this ordinance advertise for bids or let a contract to be executed by the use of Smith's brick, even though a better brick for paving purposes. They had no more right to advertise for bids and let a contract for this work to be done with any brick just as good as Diamond vitrified brick (or better) than they had to advertise to let a contract to pave the street with asphalt or sandstone blocks. If they could advertise for letting a contract to do this work with Smith's brick because it is a better material for paving than Diamond brick they might let a contract to do the work with asphalt, a better material than either kind of brick, or sandstone blocks, which are better than Diamond brick. When the charter requires an advertisement for bids to do public work to be let to the lowest and best bidder, it aims at *substance* not form.

If the city engineer and board of public works advertise for bids for this work to be done with Diamond vitrified brick, then in excluding other brick just as good they violate the city charter. They have in sub-

stance, though not in form, dispensed with this requirement of the charter. If they accept other brick just as good or better, or if they accept asphalt or sandstone blocks, they do not follow the ordinance. They can not dispense with any substantial requirement of the charter or ordinance; if they do their act is wanting in authority of law.

A city ordinance to pave can not be dispensed with. In general, that ordinance must designate the material. The reader must not forget that this suit is not on the contract of sale of the brick or other material. It is a suit against the contractor and the sureties on his bond to pay for the labor and material required and used under this contract authorized by this ordinance. In general, a bond is good if it requires the obligors to comply with the law. But here there can be no recovery unless there is a violation of law. Unless the contract departs from the ordinance there can be no recovery. The law, the city charter, requires competition and prohibits monopoly. The ordinance authorizes and establishes monopoly for the whole work, labor and material and destroys all competition.

This bond is conditioned that the contractor shall pay for all labor and material required and used in the city contract. If anything is left out of this contract—this bond—what is it? He buys all the material and pays for it. He employs all labor and pays for it. This means necessary labor and necessary material. The court say the contract for the material is an independent contract, and the contract for the labor is an independent contract. The sale or purchase of brick is an independent contract, but when the seller accepts this bond and sues on it, it is no longer an independent contract. He can not recover on this bond unless the brick were sold to be used and were used under the city paving contract to pave the street.

The statute does not contemplate bond and security separately for each item of labor. There is no such thing authorized as a separate contract for the sand, one for the lime, one for the cement, one for the brick and one for the labor. The contract is one entire contract to do all the work and furnish all the labor and material. Owners of brick, other than vitrified paving brick, can not compete under such an ordinance. Neither can the owners of sand or lime or cement. Neither can the day laborer. One man, the contractor, the monopolist, must furnish all these. The ordinance authorizes monopoly. It prohibits competition. It authorizes and requires just what the charter prohibits. The brickmaker under this ordinance dictates the price not only of the brick, but also of all other material and all labor. We are speaking of the existence of the power and not of the extent to which it may be exercised.

It may be said that nearly all ordinances fix a price beyond which the contractor can not go, as for example, one dollar and fifty cents per square yard for brick paving. He will always get the extreme limit, one dollar and fifty cents per square yard. But a power to fix a limit implies a power not to fix it. Legislation can not be coerced. There is no difference in principle in limiting the cost of the work to one dollar and fifty cents and refusing any limit at all.

If the common council of any city may violate the charter in a small degree, and have their acts held valid in the courts, they may violate the charter in a large degree and have the courts hold their acts valid. The imperative command of the law (sec. 12, City Charter, art. 17, pp. 234-5), is, that work of this character "*shall be let by contract to the lowest and best bidder.*" Can an ordinance provide that this work shall be done without compliance with this provision? Can the ordinance

in terms dispense with compliance with this provision? Shall this imperative command of the law be obeyed by city officials, or set aside, annulled and disregarded at their mere will and caprice? If the city officers can not dispense with this requirement directly, they can not do so indirectly.

Why does the city charter (art. 2, sec. 5, p. 16, City Charter of Kansas City) require members of the common council to take an oath to support the Constitution of the United States and of this State and "*the provisions of this charter,*" if they may disregard this provision or any other at their mere will and pleasure? Monopoly is just as much prohibited as train robbery.

This case (196 Mo. 281) makes a distinction between cases *ultra vires* and those prohibited by law, and it is put among cases *ultra vires*. A contract prohibited by law is certainly *ultra vires*. The law will not suppose (except perhaps in case of special tax-bills) that a corporation has power to do that which the law forbids it to do. The forbidden act ought to be held void in law. It should not form the basis for any action under it by any one who comes under it and acts under its pretended authority. Its only support is the "divine right of kings."

If the common council of any city (Kansas City, for instance), should pass an ordinance to crack all the bank safes in Kansas City and take all the money therein to pay the city debts and to pay for the parks and boulevards, this ordinance would certainly be *ultra vires*; the act to be done would be *ultra vires*. But the act would be one prohibited by law. An ordinance to rob the railroads would be equally *ultra vires*. These acts would also be prohibited by law. An innocent act may be *ultra vires*. A criminal act, an act forbidden by law, is always *ultra vires*. Cracking bank safes by nitro-glycerine, gun cotton, city ordinances, or other vio-

lent explosives; train robberies and monopolies are all *ultra vires*, but they are also forbidden by law.

Now, the city by ordinance makes a contract to crack the bank safes, to rob the trains, and to grant paving monopolies. The contractor in each case makes a contract with the city to furnish all the material and do all the work and labor necessary to complete in a good workmanlike manner the work of cracking the bank safes and robbing the trains and enforcing the monopoly. This brick monopoly, this train robbery, this cracking of the bank safes, are all prohibited by law and they are all *ultra vires*. (Perhaps, after all, the council might adjudge all these forbidden acts to be really benefits, and no tribunal on earth could reverse the decision.)

Under article 9, section 20, pages 160, 161, Kansas City Charter, the contractor's contract to crack the bank safes, to rob the train, and to establish the brick monopoly, must contain a clause that the contractor will pay for all labor and materials used in cracking the safes, robbing the trains, and in enforcing the brick monopoly. The contractor must give ample security that he will well and faithfully violate the Kansas City Charter according to the ordinance and the directions of the city engineer and that he will pay off all the hands engaged in robbing the train, in cracking the bank safes, or in supporting this monopoly. The men who furnish or do the labor, the men who furnish the material, must know of this violation of law, for they sue on the surety contract which alone gives the right against the sureties.

But knowledge of the unlawful purpose is not all. If the material is not used in the street; if the material is not used in cracking the safe or robbing the train, there can be no recovery under the bond. Before a recovery can be had the law must be violated. We have

no innocent man holding fleet horses while the principal robs the train, for unless he thus renders this assistance in robbing the train he can not recover on the bond. Monopolies are just as much prohibited as train-robbing or safe-cracking.

Generally, a party to a contract which is against law or in violation of law cannot recover on that contract. Here he cannot recover unless he has by his contract violated law and is either a monopolist or his assistant. Generally, a plaintiff must come into court with clean hands, but if he come into court with clean hands he is thrust aside by the cold hand of monopoly. Unless he is a monopolist or his assistant he cannot recover on this bond. A sale of personal property is valid even when the property is to be used in a violation of law. But if he knows of the intended violation of law and concurs in it and approves it the contract is void. The men who sold the sand; the men who sold the crushed rock, cannot recover unless they help the brick monopolist on his brick monopoly. A mere sale of sand is insufficient; a mere sale of crushed rock is insufficient. Both sales must be made to help the monopolist, the brick monopolist. The materials so sold must be so used; if not so used there can be recovery on the bond. Unless the materialmen violate the law there can be no recovery.

The selling of crushed rock is lawful; the selling of sand is lawful.

In *St. Louis Fair Association v. Carmody*, 151 Mo. 566, at 574, the court say:

“A scheme lawful in itself cannot be made a cover for one that is unlawful. The plaintiff’s race track and grand stand were lawful to be kept, but when it adds to those the gambling booth, and runs them together, and then makes a contract that is appurtenant to either and appurtenant to both, courts will not en-

ertain it merely because in its application it was not limited entirely to the unlawful purpose.

"If the house in question had been opened and used for a double purpose, viz., as an honest social club for those who do not desire to play as well as for the purpose of gaming for those who did, it would not the less be a house opened and kept for the purpose of gaming." [*Jenks v. Turpin*, 13 Q. B. Div. Law Rep. 505. See, also, *White v. Wilson's Admr.* (Ky.), 38 S. W. Rep. 495.]"

"If a law actually violates the Constitution, its nullity must be declared, notwithstanding there may have been no intent in the makers of the law to violate that instrument. The constitutionality of a law cannot depend upon the motives of its makers." [*State v. North et al.*, 27 Mo. l. c. 479.] The same rule ought to apply to the validity of an ordinance as against a city charter.

"It is asserted by defendants that the ordinance directing the improvement, and the contract therefor, were both illegal and void, and, being so, cannot authorize a recovery by the interveners. The force and efficacy of this objection depend upon the determination of the question as to whether the defendants are in a position to avail themselves thereof. It appears from the evidence that the work was completed, and tax-bills in payment thereof issued and turned over to the contractor, all in accordance with the terms of the contract. Under these circumstances it would seem that defendants are in no position to say that the contract and ordinance under which the work was done were void, and thus escape the obligation to pay for the material used by the contractor in the construction of the work. The property-owners against whom the tax-bills were issued are not here complaining, nor will their rights be in any way affected by this suit, whatever the

result may be. The controversy is between the contractor and the sureties upon his contract bond upon the one side, and the companies that furnished material for the work upon the other." [196 Mo. 300-1.]

The opinion of the court raises the question as to whether defendants "Are in a position to avail themselves" of this defense. This position is that there is a defense. This opinion assumes that monopoly is prohibited and that defendants have a defense on the ground of this prohibited monopoly. This opinion assumes that "The contract and ordinance under which the work was done were void," but defendants cannot avail themselves of this defense—this fact that the ordinance was void—this fact that the contract was void. If the contract is void—if the ordinance is void—it will require an embarrassing strain on the judicial mind to hold that the tax-bills issued under this void ordinance and this void contract are valid. The imperative command of the law, that this work "*shall be let by contract to the lowest and best bidder*," has been disregarded by this ordinance and this contract. The contractor and his sureties cannot avail themselves of this defense. The monopolist was the brick manufacturer. The materialmen the laborers and the contractor were the assistant monopolists. This monopolist was powerless to enforce his monopoly without these assistants. The materialmen can sell their material, the laboring men may do their labor, but unless all this is done to further and assist this monopolist in his monopoly, there can be no recovery on the bond.

The contractor did the work and furnished the material and received in payment, not cash, but worthless tax-bills. The property-owners will be in a position to say that the contract and ordinance are void unless estopped by something not appearing in the case or the record. The contract of the materialmen and laborers

was for pay in cash, not in tax-bills admitted to be invalid. If suit had been brought on all these tax-bills and the property-owners defend the suits successfully, could the materialmen still recover under a contract and ordinance which was in open defiance of this plain injunction of this statute law that this work, this whole work, including labor and material, "*shall be let by contract to the lowest and best bidder?*" Has the contractor derived benefits under his contract when he has nothing but worthless tax-bills?

It is true as a principle of law that a person cannot accept benefits under a contract and refuse its burdens. But here there were no benefits. It is known as a matter of law that these supposed benefits, like the apples of Sodom, will in the contractor's hands turn to dust and ashes.

The Kansas City Court of Appeals has followed *Keith v. Bingham*, 100 Mo. 300, in *McQuiddy v. Smith*, 67 Mo. App. 205, et seq. This case is a suit on a tax-bill issued for grading Locust street in Kansas City from Twenty-third street to Twenty-sixth street. The ordinance was passed in 1890, fifteen years after the adoption of the Constitution of Missouri of 1875. The tax-bill sued on in this case was a reissue, the original having been held invalid because the wrong officer computed the cost of the work. [*McQuiddy v. Vineyard*, 60 Mo. App. 610.] The case was decided in the Kansas City Court of Appeals at the March term, 1896. Mrs. Smith was the owner of the land, against which the tax-bill was issued, from the time the ordinance to grade the street was passed in 1890 till the final decision of the case in the Kansas City Court of Appeals in March, 1896.

Section 21 of article 2 of the Bill of Rights of the Missouri Constitution, adopted in 1875, is thus:

"Section 21. Private property shall not be taken

or damaged for public use without just compensation. Such compensation [for taking or damaging] shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same [i. e., just compensation for either taking or damaging] shall be paid to the owner or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad tracks without the consent of the owner thereof shall remain in such owner, subject to the use for which it is taken."

"Just Compensation" is required in two cases, first for taking private property, and second, for damaging private property. Article 7, Kansas City Charter, 1889, provides for taking private property, or condemnation cases as generally understood. It provides for taking land for streets, alleys, boulevards, parks, etc., where part of the land may be taken and part left and the part left may be incidentally damaged. Article 8 provides for grading streets, alleys, etc., where lots may be seriously injured, and yet there may be no "taking" within the meaning of the Bill of Rights as previously written here and in the United States.

Formerly these were cases of "*damnum absque injuria*" as in *City of St. Louis v. Peter Gurno*, 12 Mo. 414, et seq., and *Taylor v. St. Louis*, 14 Mo. 20 et seq., and cases cited and commented on by the court. In rendering the opinion in the case in hand, at page 208, the court say:

"In the present action, the sole defense is, that though these defendants were the owners of the property at the date of the ordinance providing for the work, and at all times since, yet they had no notice and were not made parties to the proceeding in the circuit court for assessing damages and benefits resulting

from grading the street, as was then provided by article 8 of the Kansas City charter. The circuit court held this no defense, and from a judgment enforcing the tax-bill, defendants appealed.

“In this connection it may be well to state that, although the defendants were not parties to the proceedings in the circuit court to assess damages and benefits for the proposed change of grade, yet, after the work was done and the change effected, they sued the city in a common-law action for damages and recovered the sum of \$2,750, which was paid. In our opinion, the judgment of the circuit court was correct. It was not intended by the provisions of the charter of 1889 to make the assessment of damages and benefits for grading a street a condition precedent to the authority of the city to order the improvement and assess the cost thereof to the abutting property. The purpose of article 8 was to prepare a way by which the city could have settled beforehand the damages to be incurred by the proposed improvement, so that it might be advised in advance whether or not it was proper, and for the public good, to prosecute the work. Section 15 authorizes the city—even after verdict and judgment fixing damages and benefits have been rendered—to abandon the improvement and repeal the ordinance. If, however, the city should proceed with the work without having these damages assessed, then it is clear that the property-owner may resort to the courts and there secure his damages by an ordinary action, as defendants seem to have done in this instance. [The owner could likewise sue the horse thief for his horse.] But the failure to have these damages assessed in advance of the work ought not to deprive the contractor of his right of compensation. This is a matter of which he has no control, and is a proceeding to which he is not a party.”

This decision merely interprets the Kansas City Charter as a statute. This decision does not attempt to determine the constitutional validity of this statute, the Kansas City Charter. Under article 6, section 12, Constitution of Missouri, appeals lie to the Supreme Court "in cases involving the construction of the Constitution of the United States or of this State." By amendments adopted in 1884 appeals and writs of error go from the circuit court direct to the Supreme Court in all cases where appeals and error were to St. Louis and Kansas City Courts of Appeals. So that now, and at the time the case under consideration was decided in March, 1896, the Supreme Court has exclusive jurisdiction in all cases involving the construction of the Constitution of the United States or of this State.

The court then observe that the city has complete control over its streets; it can grade and regrade, only it is subjected to liability for damages if damages result. The court finally conclude:

"So, then, it is no defense to this tax-bill that the property of these defendants, may, in fact, have been injured rather than benefited by the street grading." The same reasoning would apply to the taking as well as damaging.

Moberly v. Hogan, 131 Mo. 19, et seq., is a suit to enforce, against abutting property, a tax-bill for street paving. The court say, page 22, bottom:

"At the trial the court refused to allow defendant's offer of testimony to show that the lot was not benefited by the improvement, but that its value was destroyed thereby."

"The constitutional objections to the tax-bill are groundless, in view of a number of decisions, extending through many years of the history of this court. It is established law that tax-bills of the sort in question are

sustainable as an exertion of the taxing power. [*Garrett v. St. Louis* (1857), 25 Mo. 505; *Palmyra v. Morton* (1857), 25 Mo. 593; *Farrer v. St. Louis*, 80 Mo. 379; *St. Joseph to use v. Owen* (1892), 110 Mo. 445, 19 S. W. Rep. 713.] The authority invested with the power of taxation for such purposes determines the occasion for the tax, and levies it upon the property subject to the tax. Where that is regularly done, in accordance with the terms of the law conferring the power, the propriety of the tax in the particular instance is not a judicial question, and it is not reviewable by the courts in the manner here attempted. [*McCormack v. Patchin* (1873), 53 Mo. 33; *Seibert v. Tiffany* (1879), 8 Mo. App. 33; *Estes v. Owen* (1886), 90 Mo. 113, 2 S. W. Rep. 133; *St. Louis v. Rankin* (1888), 96 Mo. 497, 9 S. W. Rep. 910.]

"The trial court committed no error in excluding the defendant's evidence offered."

Under the particular circumstances named, "The propriety of the tax in the particular instance is not a judicial question and it is not reviewable by the courts in the manner here attempted." In what manner is this question reviewable by the courts? How and when do the courts get authority to review a question not judicial? In what cases can the courts perform the functions of the Legislature? The question stated cannot be reviewed by the courts at all.

Garrett v. St. Louis (1857), 25 Mo. 505, referred to in the case now under consideration, establishes the doctrine that if the jury are directed to consider a general benefit (one not special, peculiar, exceptive), then such statute is in conflict with that provision of the state Constitution that private property shall not be taken for public use without just compensation, yet here is a case wherein the tax is valid without any benefit at all, general or special. The tax is valid

though the lot was not benefited; "though its value was destroyed" by the work to pay for which the tax was levied, and the tax is valid.

Consider the construction put by the court on this particular statute, the Kansas City Charter. It makes provision that when a street is to be graded and private property may be damaged, a proceeding is had in court to inquire into the fact whether private property will be damaged, and if so how much? The owner may appear in court and prove the fact of damages to his property and the amount thereof. He has an opportunity to be heard on the question whether his property will be damaged for public use and the amount thereof. The constitutional provision gives him not damages for the injury done, but "just compensation." Section 12 of article 8 of the Kansas City Charter, 1889 (p. 134) is thus:

"Sec. 12. *When grading may be done—Payment of damages into court.*—Should no claim for damages be filed on or before the day set for hearing as provided in section five of this article, or if the verdict or report of the commissioners shall declare that no damage will result to private property from the proposed grading or re-grading, or if damages assessed by said verdict or report shall be paid to the owners, or into court for them, *the city may proceed to cause the grading or re-grading to be done according to the ordinance.* Payment to the clerk of the court for the owner shall be deemed a payment into court of any damages assessed."

The decision is that the city may cause the grading to be done notwithstanding this charter provision is not complied with. The city is not bound to comply with the charter or the Constitution.

The opinion in *McQuiddy v. Smith*, 67 Mo. App. at 208, says:

“It was not intended by the provisions of the charter of 1889 to make the assessment of damages and benefits for grading a street a condition precedent to the authority of the city to order the improvement and assess the cost thereof to the abutting property.”

The writer is at a loss to understand the reason for the foregoing conclusion of the court. The city may cause the grading to be done under certain circumstances: First, if no claim for damages be filed; second, if the verdict be that there are no damages; or third, if damages be assessed and such damages are paid to the owner or into court for the owner. The city is not authorized to grade, unless these damages are paid to the owner or into court for the owner. Here Mrs. Smith's lot was damaged by the grading to the extent of \$2,750. The law seems to be that upon payment of this \$2,750 to Mrs. Smith the owner, or into court for Mrs. Smith the owner, the city may cause the grading to be done. Has the city *the power* to cause the grading to be done without complying with this condition? Suppose the verdict in this cause had ascertained the fact, as it afterwards turned out, that Mrs. Smith's property was damaged to the extent of \$2,750. Under this statute had the city the power “To cause the grading or regrading to be done according to the ordinance,” without paying this \$2,750 to Mrs. Smith, or into the court for Mrs. Smith? The verdict and judgment merely ascertained the fact of damage and the amount. The verdict and judgment did not create the damage.

The construction put by the court on this Kansas City Charter becomes a part of it the same as if copied into it. “It was not intended by the provisions of the Charter of 1889 to make the assessment of damages and benefits for grading a street a condition precedent to the authority of the city to order the improvement

and assess the cost thereof to the abutting property."

They may grade the street and thereby damage private property for public use. They may so grade and may so damage private property for public use without ascertaining in advance or paying in advance "just compensation" to the owner or into court for the owner. This is this statute judicially construed.

If the Legislature may thus make a law to damage private property for public use without providing in that law for ascertaining such "just compensation" in advance, and paying it to the owner or into court for the owner, then the Legislature may in like manner make a law for taking private property for public use without any provision for ascertaining or paying "just compensation" for such taking, either in advance or otherwise, or to the owner or into court for the owner (as in 25 Mo. 277).

Under the Constitution of Missouri of 1875, the owner of private property is just as much entitled to "just compensation" in advance for damaging private property for public use as he is entitled to "just compensation" in advance for taking his private property for public use. Both rights are secured in the same sentence in the Constitution.

"Legislative acts which direct private property to be taken for public use must provide the owner with a proper remedy to obtain compensation, or they will be disregarded by the courts as inconsistent with the constitution." [*Walther v. Warner*, 25 Mo. 277 loc. cit. 285-6.]

Although in a proper condemnation proceeding "just compensation" was ascertained and paid to the owner in *Walther v. Warner*, supra, yet this was no defense to the action of trespass in entering the land and building the road. The Kansas City Charter pays the wrong man. In *Walther v. Warner*, supra, notwith-

standing that in a condemnation proceeding the owner secured "just compensation" for the land taken, he can still recover for the trespass committed, for the wrong done, while in *McQuiddy v. Smith*, although Mrs. Smith recovered "just compensation" for damaging her private property for public use, she must pay the cost of doing that damage. The landowner was more fortunate in *Walther v. Warner*, supra.

If in the way of a local tax a landowner can be compelled to pay the cost of damaging his private property for public use, why can't he be compelled in the way of a local tax to pay the cost of taking, up to the value of the property? If private property can be damaged without paying for it why can't it be taken without paying for it?

In *Armstrong v. The City of St. Louis*, 69 Mo. 309, et seq., one question was whether an action of ejectment might be maintained against St. Louis for land used by the city as a street. The case was decided at April term, A. D. 1879, of the Supreme Court. Say the court at page 311:

"The principal question in this case is, whether an action of ejectment will lie against a city, by the owner of land wrongfully taken by the city and converted into and used as a public street. There are authorities which hold that the action cannot be maintained, but the reasons given for it are unsatisfactory."

In *Cowenhoven v. City of Brooklyn*, 38 Barb. 9, the court say:

"The claim of the corporation, if any, was to a public right of way over the land, not incompatible with the title of the plaintiff, for it was a mere easement, nor with his possession, for if he owned the fee of the land over which the street passes, he would, in contemplation of law, be in possession of the street, and might maintain trespass against another for any use of

the land except for the purpose of traveling." Commenting on this language of the Supreme Court of New York, the Supreme Court of Missouri say:

"The owner of the land in such case is as entirely deprived of the use of the land as if the city had taken it and claimed to be the owner in fee simple. To say that he is in 'Contemplation of law in possession of the street' is no answer to the real fact that he is entirely deprived of the possession. He has the same right to travel over the street as any other person not, however, as owner of the property, but as one of the public, any one of whom can exercise as much dominion over the property as he. *He is entirely deprived of his property.* He cannot sue the public or any one traveling on the street, and recover his property; and if he cannot sue the corporation, which has taken and holds possession of the premises as a street, and recover the specific property then *private property may be taken and held for public use, without a compliance with the law providing a mode of condemnation.* He may sue and recover its value from the city, and has no other remedy, it is contended; but this would be to hold his property at the mercy of the city, which can take it away from him, and compel him to accept, in lieu of the property, the amount of money a jury may estimate it to be worth, or, rather, a judgment for that amount, which may possibly never be satisfied, and thus force him to exchange his land, which he may wish to hold, for money, or other property, which he does not want. *He has a right to the specific property and no corporation, not even the State, can deprive him of it but in the manner provided by law.*"

In *Walther v. Warner*, 25 Mo. 277, the railroad company did not comply with the Constitution and the law, and her contractor and his assistants were liable in an action of trespass brought by the landowner. The

landowner obtained judgment against the contractor for what the contractor did. In *McQuiddy v. Smith* the contractor obtained judgment against the landowner for what he did. The contractor had no contract with the landowner in either case. Here is a strange reversal of rights and liabilities.

In *Soulard v. St. Louis*, 36 Mo. 546, et seq., the landowner recovered against St. Louis in an action of trespass the value of the land taken by St. Louis for public use as a street. When the money was paid the title passed by operation of law. If I take personal property by trespass, the owner may in an action of trespass recover against me the value of the personal property taken, and when the judgment is paid the title to the property passes by operation of law.

In like manner the landowner may now recover in an appropriate action just compensation (this may be more than damages) for damaging his private property for public use by corporate action. This "just compensation" for either taking or damaging may now be recovered by the landowner from the corporation. But the corporation, through its contractor, can recover from the damaged landowner the cost of doing the damage under the law of taxation. Why can't the corporation by taxation recover from the landowner the cost of taking, including the value of the land? It is certainly a most remarkable law that pays the wrongdoer to do this constitutional wrong. He is a constitutional highwayman. Because the thing is prohibited to the corporation, the courts look on the act as being one which the corporation has no capacity to do. Stealing is prohibited, i. e., the law takes away from the individual the power to steal. People cannot steal because the statute takes away their capacity to do so.

In *Powers v. Hummert*, 51 Mo. 136 (referred to elsewhere), a railroad condemned land for its road and

after the commissioners's report was filed, but before the money was paid into court, the contractor for grading the railroad entered on the land and tore down the fences and commenced grading the roadbed; then the money was paid into court for the landowner who took the money; he was just like a corporation in that respect and sued the contractor in trespass and recovered, directly the reverse of the holding in *McQuiddy v. Smith*, above cited. If the city authorize a trespass or wrong it is dangerous to sue the trespasser. He may file a counterclaim for the cost of doing the trespass (for the laborer is worthy of his hire, especially if he is hired to violate the Constitution), and the wronged individual may have to pay more on the counterclaim than he obtains on the petition.

CHAPTER 9.

OUR CONSTITUTIONS IN THE LIGHT OF THE HISTORY OF THE STATES.

We ought to read the Constitution of Missouri, adopted in 1875, in the light of the previous history of the State.

By ordinance of the State Convention on July 19, 1820, a public fund for roads and canals is provided. Five per cent of the sale of lands was put into a fund to build roads and canals (see R. S. 1825, vol. 1, p. 40, under "Third" at bottom of page). Article 7 of the Constitution of 1820 provided that "Internal improvements shall forever be encouraged by the government of this State," and funds are required to be provided for improving roads and rivers. We have the canal fund yet in all our Revised Statutes in Missouri even now. Article 7 of the Constitution was not changed till 1865. Pursuant to the direct requirement of the Missouri Constitution of 1820, to encourage internal improvement, the State issued its bonds and took stock in roads and railroads. This continued for forty-five years after the admission of the State into the Union. During this forty-five years, the State became involved to a very great extent financially. Railroads and roads were of more importance than streets. Plank roads were first used and then macadamized roads. These were all "toll" roads. They were called "Turnpikes." The corporation was required to construct and operate the road and was authorized to charge "toll" for each wagon, horseman or vehicle passing over the road. A road of that kind was in use in this county connecting Kansas City or Westport landing with Westport. This road was used in 1865 as a "toll" road. The toll gate

was near Twenty-fourth street and Grand avenue in Kansas City. We had then in early times state roads and county roads. Later came railroads. The counties, cities, towns and villages had subscribed stock and issued their bonds for railroads. In article 11 of the Constitution of 1865, three sections are thus:

“Section 13. The credit of the State shall not be given or loaned in aid of any person, association or corporation; nor shall the State hereafter become a stockholder in any corporation or association except for the purpose of securing loans heretofore extended to certain railroad corporations by the State.”

“Section 14. The General Assembly shall not authorize any county, city or town to become a stockholder in or to loan its credit to any company, association, or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election, to be held therein, shall assent thereto.”

“Section 15. The General Assembly shall have no power, for any purpose whatever, to release the lien held by the State upon any railroad.”

Section 13 took away all power in this direction and section 15 is a direct and positive vote of the want of confidence. The Legislature of the State, possessing all legislative power, is supposed to be so just and honest as not to yield the state interest to any one, and they, entrusted with making laws for the whole people of the State, are supposed to be so wise that no artifice or cunning can be contrived by which the people's interest entrusted to their hands will in any degree suffer. “We have no confidence in you,” say the people to the Legislature. It is so blunt and positive as to be an insult to their honor, honesty and integrity. The Constitution says to the Legislature, “You shall not release the state lien on any railroad.” Read the language of the Constitution in the light of the history of

the State in its connection with the railroads: "You shall not release this state lien. We have no confidence in you. You are shorn of all power on this subject. You are not fit to be trusted!" Such a declaration against a private person would be almost an actionable slander or libel; however, there were very good grounds for this want of confidence.

Section 14 is a direct vote of want of confidence in county courts, city, town and village councils: "The Legislature shall not authorize any county, city or town to become a stockholder in or loan its credit to any company, association or corporation, unless *two-thirds of the qualified voters of such county, city or town at a regular or special election to be held therein shall assent thereto.*"

Neither the county officers elected by the people, nor the city or town officers elected by the people, are to be trusted. The whole people are close to them and can watch them. If a man is not worthy, the people are the persons to know him and they need not elect him. The officer may be elected by a bare majority but if the stock was to be taken, or bonds issued, *two-thirds of all the voters must have assented thereto.* A majority was not enough; there must be two-thirds. Here was a want of confidence in the official. While the road or railroad may be a great public benefit to the county or city or town, yet the chosen representatives of the people were not to be trusted in this matter without the two-thirds vote. If one hundred men out of three hundred oppose the road or bonds there was no official with power to act or issue bonds or take stock. The tax power was involved when the state credit was loaned or bonds issued or stock taken. The tax power was involved when the city or town or county took stock in railways or issued bonds. If a municipal corporation can create a debt it must pay by taxation. Here is

great want of confidence in the county, city and town officials on this question as a tax question.

Then we began action under the Constitution of 1865. The State ceased to take stock or issue bonds for roads and the Legislature authorized cities and towns to take stock (and of course pay for it by levying a tax) or issue bonds for roads (a tax must be levied to pay the bond). The county court, the city and town government took stock and issued bonds for road-building, but it was soon ascertained in actual practice that these officials could not be trusted even when supported by a two-thirds vote. Accordingly in the Constitution of 1875 all power on this subject was taken away. The tax power was involved in all these roads just as much as it is now involved in our streets. The State, the city, the town and the village can get money only by taxing. There is no other way to get money to pay a state or county or city or town bond, and if the corporation cannot tax, it cannot make a bond.

Some power must determine whether a proposed road will be any benefit, and if so how much. Roads are in general beneficial to the country through which they pass. How much benefit the road was to the State, to the public, was determined by the Legislature. In 1865, after an experience of forty-five years, it was determined by the people through the Constitution, that the Legislature was not a safe tribunal with which to entrust this question of benefit in issuing bonds or taking stock in railroads. Individuals could take stock in railways and give their notes and bonds to pay for them. Individuals have been known to take stock in roads and lose everything they put into the road. As legislators they were not improved in this respect by merely being raised from the private walks of life to the ranks of legislators. If the Legis-

lature had taken stock in railroads and paid for such stock by bonds; if such stock had doubled—trebled—quadrupled—in value and had paid ten per cent dividends per annum, the legislative power to determine these benefits would not have been taken away from the Legislature. The State, under the judgment of the Legislature, entered into speculations in railroad-building and as a stockholder was to receive large benefits and dividends, but the supposed benefits were never realized. The State was a poor speculator. In fact, the other fellow always speculated; the State always lost, relying on the judgment of the Legislature as to benefits. In 1865, after forty-five years of experience in the matter of these legislative determinations of benefits from roads, the people, through the Constitution, concluded that the Legislature was a poor judge, and its power was taken away. The Legislature had authorized counties, cities and towns to issue railroad bonds, but their good judgment as to benefits was questioned so that they could not act—could not determine these benefits—and issue the bonds unless two-thirds of the voters voted for them. Without this two-thirds vote the county court, the city council, the town council were not proper or safe tribunals to determine this question of benefit to be derived from the road. The county court, the city council, the town council, even when advised by a two-thirds vote, were in practice very poor judges of the benefits of roads and the proper method to get them. The county, city, town, always lost. Co-stockholders, always got the best of the bargain. So in 1875 the people of this State, after fifty-five years of experience, took away this power. The Legislative judgment had always been at fault. The judgment of the county court, the city council, town council, had always been at fault, and the power was taken away entirely. The State could not take the

stock or issue the bonds nor authorize the city, county or town to do so even with a two-thirds vote. The legislative judgment, the official judgment, was not to be trusted. After fifty-five years of experience this was the people's determination as expressed in the Constitution they adopted in 1875.

If the business judgment of the state legislature on issuing bonds and taking stock in railroads is discredited—if the business judgment of the county court and the city council and town council on the question of benefits in bonds and stocks for railroads is discredited—not to be relied on, why should the abutting property-owner be turned over to such poor judges—judges not to be relied on—not to be trusted after fifty-five years of fair trial—judges whose bad (and in some cases perhaps corrupt) judgment, has financially ruined some of our cities and towns, and even counties? We are taxed to death.

Section 9 of article 8 of the Constitution of New York is thus:

“It shall be the duty of the Legislature to provide for the organization of cities and incorporated villages and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and in contracting debts by such municipal corporations.”

Here is a requirement to provide for the organization of cities and incorporated villages and to restrict their—

1. Power of taxation;
2. Power of assessment;
3. Power to borrow money;
4. Power to contract debts;
5. Power to loan their credit.

These things must be done so as to prevent—

1. Abuses in assessments.

2. Abuses in contracting debts.

Without entering at large into the meaning of this language used we presume there can be no doubt that the framers of the New York Constitution meant that whatever restrictions were placed on the power of *assessment* (meaning local taxes or assessments on abutting property), must be placed there by the Legislature. It disclaims any intention on the part of the framers of the Constitution to place restrictions on assessments or local taxes. The Missouri Constitution does not in term, or by implication, require the Legislature to restrict the powers of cities and incorporated villages in making local assessments. The Missouri Constitution restricts taxation without referring the matter to the Legislature to make restrictions. The power to make an assessment must exist before it can be restricted. The New York Constitution assumes the existence of the power and refers the whole subject to the Legislature. With this specific provision on local taxation, other parts of the Constitution do not and can not apply. With this specific provision in force, the other rules of constitutional law do not apply, such as these: "No person shall be deprived of life, liberty or property without due process of law;" "Private property shall not be taken or damaged for public use without just compensation," etc., etc.

The New York Legislature could provide for the organization of cities and incorporated villages as well without this provision as with it. The New York Legislature could restrict their powers of—

1. Taxation;
2. Assessments;
3. Borrowing money;
4. Contracting debts;
5. Loaning credit;

as well without this constitutional provision as with

it. It is no restriction at all. The statute admits a power in cities and incorporated villages to tax, to contract debts, to borrow money, and loan credit.

“There is no way of enforcing this injunction on the Legislature. Under our system of government there is no power to compel the legislative department of government to make laws. Constitutions may restrict legislative powers, and declare what laws shall not be valid; but from the very nature of legislative power, its exercise in a particular case must depend upon the volition of the Legislature. Responsibility to a constituency, and a sense of public duty are *the only incentives* which can prompt legislative action.” [St. Joseph Board of Public Schools v. Patton et al., 62 Mo. 444, at 448 (A. D. 1876).]

Again, page 449:

“The Legislature already possessed the power of limiting taxation to the maximum adopted in the Constitution.”

“Private property shall not be taken or damaged for public use without just compensation,” is in substance in the Constitution of New York. “No person shall be deprived of life, liberty or property without due process of law,” is likewise in substance a part of the Constitution of New York. All the parts of a statute must be construed together and a constitution is a statute within the meaning of this rule. The only difference is that no act of the state Legislature can override the state Constitution. In the respects indicated the New York Constitution makes no restrictions. The New York Constitution requires her Legislature to pass laws restricting the powers of cities: first, of taxation; second, assessments; third, of borrowing money; fourth, of contracting debts; fifth, of loaning their credit. Why restrict these five powers if they do not exist?

The power to tax is generally regarded as a legislative power, and in general, legislative powers cannot be delegated. Cities in New York without any general or special act of the state Legislature, by mere force of the state Constitution without more, possess the powers enumerated, viz.: first, taxation; second, local assessments; third, borrowing money; fourth, contracting debts; fifth, loaning their credit. Cities in New York have the powers named. No act of the New York Legislature is necessary. Unless the Legislature make restrictions, these five powers are absolutely without any limit.

A city in New York, by the mere force of her Constitution, without any enabling act on the part of her Legislature, may tax all the property in her city limits one hundred per cent; that city may make a local assessment of one hundred per cent; the city may borrow money to the extent of one hundred per cent of all the taxable property; the city may contract debts to the extent of one hundred per cent of all the property in the city; the city may loan its credit to the extent of one hundred per cent of all the property in the city and these Shylock bonds are good unless the Legislature restrict these five powers, and then the bonds are good up to the line marked out by the Legislature.

In local taxation, and in the other kinds of taxation, the New York Legislature is not governed or limited or controlled by her Constitution. Such is the plain meaning of the language used by the framers of that Constitution. The New York Constitution confers the five powers which it directs her Legislature to restrict "So as to prevent abuses in assessments and in contracting debts by such municipal corporations." It is said that "All power may be abused." This is the favorite expression of the advocates of the unlimited power of local taxation, a power that does

not exist cannot be abused. A power that does not exist cannot be restricted.

In 1875 the Supreme Court of Missouri, and almost all the states, had given a constitutional character to local taxation by a great number of decisions. It was taxation on benefits. Other kinds of taxation were burdens. These local taxes were not burdens. We now see that this was the song the sirens sang luring us on to destruction. It was the serpent in Eden just before the fall. It was the kiss of Judas just before the crucifixion. It was the destroying angel entering our midst wearing the livery of heaven, beginning anew the work of destruction, putting the few, the defenseless, the weak under the unlimited power of city and town councils who (notwithstanding all the checks on arbitrary power) had for more than half a century been traitors to the interests entrusted to their care. It is the Benedict Arnold of our country. It is worse than the rattlesnake, which gives you notice before it strikes the fatal blow and administers the fatal poison. This vicious doctrine has pursued and still pursues the defenseless, the few, the weak, to their destruction with the relentless fury of the damned. It puts *right* on the scaffold and *wrong* on the throne. It is the Parthian arrow that penetrates the heart of the constitution and deadens it. It is the prolific parent of more injury, wrong and injustice in one year than all the other robberies, larcenies and burglaries in ten years. It is the malignant cancer that has eaten the heart out of our constitutions and laws. And when now the unfortunate victim ends his days on earth—when he enters old Sharon's boat to be carried over the Stygian river—the Lethean stream of forgetfulness and death—if old Sharon's boat lands him in Pluto's dominions, he may rest serene in the assurance that the statutes

and constitution of Hell are not, never were, never will be and never can be worse.

"It is well settled by the decisions of this court that assessments like those sued on are not regarded as a tax but as an assessment for improvements, and are not considered as a burden but as an equivalent or compensation for the enhanced value which the property derived from the improvement."

Did the court mean that such assessments were not considered as burdens while they were in fact the most onerous of burdens? Did the court mean that we were to take the declaration as a judicial lie? This tax is an equivalent or compensation for the enhanced value which the property derived from the improvement. When the value is enhanced one dollar, did the courts mean that the property-owner must pay two, three, or a hundred dollars? Did the court mean to assert that a one-dollar benefit is the equivalent of a two-dollar tax? If so, we may have a thousand-dollar tax the equivalent of a one-dollar benefit. Is this the equivalency meant by the court? Did the court mean that the humble citizen, for one dollar benefit conferred by the public, the state, or city, or town, without his request, should be compelled to pay against his will one hundred dollars? When there is no benefit at all, did the court mean that the property-owner must pay this tax as an equivalent for the benefit conferred which was nothing? Did the court mean that the property-owner must pay a three-hundred-dollar tax-bill as an equivalent or compensation for a twenty-seven-hundred-and-fifty-dollar damage to his property? Was that the enhancement in value meant by the court for which the property-owner must pay?

Did the court in its decisions prior to 1875 mean that this was the tax which was no burden? The Supreme Court of this State had held in numerous decisions that if there was lacking this peculiar, exceptive,

benefit, the local tax was unconstitutional. The Supreme Court had held in numerous decisions that a general benefit rendered the tax unconstitutional. [25 Mo. 535.] The case of *City of St. Louis to use v. Allen*, referred to supra, was on tax-bills for "curbing, guttering and macadamizing" in front of defendant's property. This decision was rendered in 1873, two years before the Missouri Constitution of 1875 was adopted. The tax-bill in the case of *Sheehan v. The Good Samaritan Hospital* was "for the improvement of the street on its front." "Local assessments are constitutional only when imposed to pay for local improvements conferring special benefits." [54 Mo. l. c. 474.] This was in 1873. None of these cases are condemnation cases involving what is called the power of eminent domain. Local taxation is involved alone. The constitutional provision in reference to taking private property for public use was changed. "Private property shall not be taken or applied to public use without just compensation." In *Newby v. Platte County*, 25 Mo. 258, the court held that what was a just compensation for land taken was a judicial question for the courts, not a legislative question for the legislative power. The constitutional provision was changed.

It was well known that town lots were in many cases ruined by lowering grades, or by cuts and fills, so that the property was inaccessible. We have streets in Kansas City graded in 1854 for the Santa Fe trade and much of the abutting property has been rendered worthless and unfit for use for more than fifty years. Grading a public highway we may say is always an advantage to the public but it may be an advantage or a damage to abutting property. Grading proved a total ruin to many lots here in Kansas City, notwithstanding the village had only five hundred population when the grading was done, and two hundred and fifty thousand

population in *the city* fifty years afterward. The Constitution of 1875 aimed to remedy such cases. In *St. Louis v. Peter Gurno*, 12 Mo., the property was damaged \$1,675, according to the verdict of the jury and judgment of the court. The judgment was reversed, not because the ordinance of the St. Louis council directing the grading had conclusively determined that the grading was a benefit to Gurno's property, but because it was "*damnum absque injuria*" to that property. St. Louis must determine whether the grading of this street is a benefit to St. Louis. St. Louis can decide that only by agent. Hence, the action of her council is conclusive against the city, but it is not conclusive against the abutting property-owner. It was not claimed that the St. Louis council had power to decide the question whether this grading would benefit abutting property, and that she had so decided that it was a benefit by passing the ordinance to grade the street, and that therefore court and jury cannot inquire into it. The case is a case of confession and avoidance. The damage is admitted but it is "*damnum absque injuria*." Prior to 1875 no one ever claimed that Mr. Gurno's property was really benefited by this grading; that the St. Louis council had power to decide that question and by passing the ordinance did conclusively and finally determine that the work was a benefit and not a damage, and that the property-owner could not inquire into the question in the courts.

Hence, the change in the Constitution in 1875, "Private property shall not be taken or damaged for public use without just compensation." After the adoption of this Constitution in 1875, the property-owner was just as much entitled to just compensation for damaging his private property for public use as for taking it for public use; both rights are secured in the same sentence in the Constitution. What is a just

compensation for damaging private property is just as much a judicial question as what is just compensation for taking. "The rule of constitutional law being that private property can not be taken for public use, by the authority of the Legislature, without a just compensation, it follows that what is to be considered as compensation within the meaning of the clause is a question of law for the courts and not a matter for the Legislature." [25 Mo. 263 (A. D. 1857).] The same rule ought to apply to damaging. This decision of the Supreme Court of Missouri construing the Constitution of the State became a part of that Constitution the same as if copied into it, and this was a part of the Constitution prior to 1875 the same as if copied into it. In the Constitution of 1875, damaging is just as much prohibited as taking; both words are in the same sentence associated together by the framers of the Constitution. What is damaging private property for public use, rather what is just compensation for damaging private property for public use, is under the Constitution of 1875 just as much "A question of law for the courts and not a matter for the Legislature," as what was just compensation for taking under the Constitution of 1820 or 1865.

State roads and railroads are a great advantage to the State. From such state roads and railroads the State derives much benefit. But it was ascertained after faithful trials for more than forty years that it was unwise to trust the legislative determination of benefits from roads and railroads. The roads and railroads were undoubtedly some benefit to the State and her property and citizens. But in experience the benefit cost too much to the State. The State built the roads, and the other stockholders owned them. The state Legislature in place of running the roads and railroads, was run by them and perhaps to the disadvantage of

the State. Roads and railroads were and are a benefit to the counties and cities and towns through which they pass. But the county court, the city and town council, were not wise enough to judiciously secure benefits from roads and railroads without the two-thirds vote of the county, city or town, and with all this good and judicious advice derived from the two-thirds vote, it was ascertained in 1875 that in place of the county court, city or town council, controlling railroads, the roads and railroads controlled the county court, the city council, and the town council. The state legislatures, the county courts, the city councils, the town councils, were knaves or fools not to be entrusted with this power of taxation for roads and railroads and with the determination of benefits derived from such sources. Hence, the power was taken away entirely. There was too much danger of injury and fraud. But the framers of the Constitution of 1875 went still further. The provision adopted was that private property shall not be taken or damaged for public use without just compensation, but it also provided that such just compensation, either for taking or damaging, shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be provided by law. "And until the same (just compensation) shall be paid to the owner or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested."

The law to be enacted may provide for a jury or it may provide for a board of commissioners of not less than three freeholders. "Just compensation" must be paid either to the owner or into court for him. This Constitution contemplates a jury or commissioners and a court. This requirement of the Constitution could not be satisfied by a law appointing city councils, or town councils, commissioners or a jury. This Consti-

tution did not contemplate making a town council a jury to ascertain just compensation for land taken for public use, and land damaged for public use is to be treated the same way. The money may be paid into court. This contemplates a proceeding in court, whether the land be taken or damaged. For condemnation proceedings, as usually understood, we have always had a court proceeding. Now, damaging and taking are put together in the Constitution. If the reader will excuse the expression, we may say we have a condemnation for taking and a like condemnation proceeding for damaging. Whether the just compensation shall be one dollar or one thousand dollars, is for the court. The condemning power cannot determine this question. Whether the thing done is a taking, is a judicial question for the court (*St. Louis v. Hill*, 116 Mo. 527). Whether a given act is a damaging, is certainly a judicial question for the courts.

The city could not use a street and then when sued defend on the ground that it never took it, and by its own determination bind the property-owner. This was the law, constitutional law, ten years before the adoption of the Constitution of 1875 (*Soulard v. St. Louis*, 36 Mo. 546.)

Read the Constitution of Missouri of 1875 in the light of the Constitution of 1865 and 1820, in the light of history of the State on roads and railroads, and on state and municipal aid to roads and railroads and public improvements, and on the power of the Legislature to determine the benefits of the State and the county courts, and city and town councils, to determine benefits to the county, the city, the town. Read the Constitution of 1875 in the light of the municipal bond litigation against cities, towns and villages, and counties, and the public discontent as to taxes to be raised to pay these bonds, and the hardships endured on account of

municipal debts for public improvements, and the imprisonment of county judges for refusing to levy taxes to pay judgments on municipal railway aid bonds, and the well-known public sentiment of distrust in these various railway schemes involving taxation. And during all this turmoil, no one ever doubted the benefits of roads and railroads. The distrust was in the Legislature, in the county court (cropping out in one instance in the tragedy at Gunn City), in the town and city council. Read the Constitution of 1875 in the light of the decisions of the Supreme Court construing similar provisions in the former constitution. Local taxation without the special, peculiar, exceptive benefit was unconstitutional. If the benefit was general, the tax was unconstitutional. That was constitutional law in this State at the time the Constitution of 1875 was framed and adopted.

If the benefit was general, the local tax was unconstitutional. It was at least equally unconstitutional if in place of a general benefit the property received a damage. In *Cole v. LaGrange*, the Supreme Court of the United States held that municipal bonds given to encourage manufacturers in the town, were without authority and the reason for so holding was that there was no power to tax for such purpose. This was the assertion of a mere want of authority.

Before 1875 a local tax for anything except that conferring a special, peculiar, exceptive benefit was unconstitutional.

Grotius tells us that "The property of subjects is under the eminent domain of the State, so that the State, or he who acts for it, may use and even alienate and destroy such property, not only in cases of extreme necessity—in which even private persons have a right over the property of others—but for the ends of public utility; to which ends those that founded civil so-

ciety must be supposed to have intended that private ends should give away; but it is to be added that when this is done the State is bound to make good the loss." [*Newby v. Platte County*, 25 Mo. at p. 260.] Puffendorf is quoted from also.

We have quoted elsewhere from the Memoirs of the Turkish Government and the lot in Constantinople. After making these statements as to continental law, our Supreme Court, continuing say:

"But in Europe this principle is, in reference to the action of the government, a mere moral rule imposing no legal restraint upon the legislative authority; while the American people, by incorporating it into their Constitution and making it a rule of constitutional law of superior obligations to the enactments of the legislative department, have placed private property under judicial protection, against all efforts on the part of the government to take it from the owner," etc., etc. [25 Mo. 262.]

A general benefit made this local tax unconstitutional. From the issue of state bonds and county bonds and city and town bonds for public improvements, such as roads and railroads, the people of the State became well acquainted with what the Legislature would do if subject only to moral rules. They became well acquainted with what the city and town and village council would do, even when advised by a two-thirds vote if subject only to moral rules. Moral rules were not a sufficient restraint on the Legislature. The moral rule was good enough, but the Legislature would not or did not follow it. Moral rules were not a sufficient restraint on county courts and city and town and village councils. Moral rules were good enough, but they did not follow them. If, in the opinion of the framers of the Constitution of 1875, moral rules were not sufficient for public improvements of the State to be paid by

state tax; if moral rules were not sufficient for the county court for public improvements (railroads and roads); if moral rules were not sufficient for city and town council for roads where all property is taxed—was it intended to be the rule for street improvements, where the abutting property alone is taxed?

Read the Constitution of Missouri of 1875 in the light of the history of the State on state bonds and county bonds and city bonds and town bonds, and aid to railroads and roads, and its restrictions on the creation of debts by towns and cities.

“At the trial the court refused to allow defendant’s offer of evidence to show that the lot was not benefited by the improvement but that its value was destroyed thereby.” [131 Mo. p. 22 (bottom), 23 (top).] The judgment was affirmed (A. D. 1895, a suit on a tax-bill for paving the street). In 1884, nine years after the Missouri Constitution was adopted, the Supreme Court had said (and it must have been constitutional law up to that time) that the property-owner, in a suit on the tax-bill, could “entirely defeat a recovery by overthrowing the theory of benefits conferred.” [84 Mo. 259.]

In *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155, and in other well-considered cases in this and other states it is decided that property exempted “from taxation of every kind” is still liable for assessments for local improvements. In the case just cited the court say:

“The tax-bill here sued on is not regarded as a tax, but as an assessment for improvements, and is not considered as a burden but as an equivalent or compensation for the enhanced value which the property derives from the improvement.” [84 Mo. 259.] *Is this a distinction without a difference?*

All our constitutions in Missouri from 1820 to the

present time have required property to be taxed according to its value. The Constitution of 1820 did not require all property to be taxed. The Constitution of 1875 remedied that matter by declaring that certain property shall be exempt and that all other property shall be taxed or rather that no other property shall be exempt by act of the Legislature. Assessments of property were required to be uniform throughout the State. The city or town assessment could not exceed the state assessment. This was to prevent a town lot being assessed at ten dollars value for state taxation, and one hundred dollars for town taxation. The state assessment controlled. The town assessment could not be higher than the state assessment. It might be equal to it, but by no means could it exceed the state assessment. Gentle reader, did you ever know of a single town lot in any city, town or village in Missouri since the present Constitution was adopted (Nov. 30, 1875) being assessed at a lower value for city, town or village taxation than the state assessment? They always come up to the state assessment; they would go beyond it if they dared to do so. The Constitution is in their way. And it is no answer to say that the state assessment is only forty per cent of the real value. Property had never been assessed at its real value. This had been the rule of assessment from the time of the admission of the State into the Union. This applied to all property alike. All people are very, very poor when the assessor comes around to get the assessment. People have very little property then, and that little is not worth anything. Real estate at that time ceases to have any value except one merely nominal. The true value is never revealed except in case of fire (and then only to collect on the fire policy), or in case a railroad needs the land, or kills the cow, or the city or town needs the land for a park or street or boulevard.

The framers of the Constitution of 1875 knew this to perfection. They were well aware that for taxation, low assessments (far below the real value) had always been made. The rule was almost universal. Everybody had a right to swear to a lie and return it to the assessor. The return values have always been low, very low, scandalously low. This was well known to the framers of the Constitution of 1875. They knew that cities, towns and villages would make assessments enormously high in order to get money to spend. Their necessities would know no bounds. The largest tax is one per cent. They could double or treble the assessment and get money to spend. They can not contract debts beyond five per cent on assessed values. The state assessment can not be exceeded. If it were not for this constitutional restriction every city, town and village would make estimate of the amount of money they need, and then find what sum that was five per of, and that would be the assessed value of the town. The framers of the Constitution determined not to leave this means of escape. They knew of the custom of low values for taxation. They knew that these low values for taxation had been the rule in England for more than three hundred and fifty years before they framed this Constitution.

Hugh Latimer, in a sermon at Stamford, about A. D. 1545, says:

“When the Parliament, the high court of this realm, is gathered together and there it is determined that every man shall pay a fifteenth part of his goods to the king, then commissioners come forth, and he that in sight of men, in his cattle, corn, sheep, and other goods is worth an hundred marks, or an hundred pound will set himself at ten pound; he will be worth no more to the king but after ten pound. Tell me now, whether this be theft or no? He will marry his daughter and

give with her four or five hundred marks, and yet at the valuation he will be a twenty-pound man." How long this sentiment existed before Hugh Latimer denounced it in such scathing terms, the writer has no means of determining, but no one doubts that just such conditions existed then in England and exist yet. The bank deposits in one city are several times as much as the whole personal property assessment of all the county. The assessor dwarfs values. The framers of the Constitution knew this.

Read the Constitution of Missouri, adopted in 1875, in the light of the history of the State, the legal and constitutional history of the State, up to that time.

The framers of the Constitution of Missouri of 1875 knew what the people of this State had been doing ever since the admission of the State into the Union, just what Hugh Latimer, the reformer, so vigorously condemned 350 years before. They knew, too, that county courts, city, town and village councils were totally unfit and unsafe persons to issue bonds or incur debts for public improvements. Hence, in the new Constitution they were limited in their debt making power to five per cent of the assessed value of the property. The framers of the Constitution well knew of the keen, sharp, decisive, over-weening anxiety of city and town councils to spend money and incur debt. The framers of the Constitution were apprehensive that cities, towns and villages might be very anxious to incur debts for public improvements, and this over-weening anxiety might prompt them to make a very high assessment. The city assessment cannot exceed in amount the state and county assessment. Gentle reader, did you ever know a city assessment to be less than that? The city makes the assessment the highest possible; then the city levies the highest possible rate. And every city, after making the highest assessment possi-

ble and after levying the highest rate possible, has nothing left to improve streets.

Kansas City has 177 miles of streets, including 48 miles yet to be condemned or dedicated. This estimate takes no account of alleys. The city can improve these streets and pay for such improvement in two ways: first, out of the general revenue; second, by tax-bill on abutting property. Except in front of public squares and in front of parks, the city has not paid for one hundred yards of street improvement in thirty years, out of the general revenue.

It was the boast of the people of Missouri, and of the framers of the Constitution of 1875 that here the private property of the citizen was placed under judicial protection against all efforts on the part of the government to wrest it from him, except for public use upon just compensation made, and that private property here had a protection wholly unknown to the legal systems of Europe. "Private property shall not be taken or damaged for public use." They supposed, really, that they were in 1875 giving greater security to private property as against the public than had been known before. The power of the Legislature over bonds and other debts for railroads and other public improvements (including taxation resulting therefrom); the power of the county court, the city council, the town council over railroad aid bonds and taxation from that source, had been curtailed and finally taken away in 1875. By their conduct thus evinced, the framers of the Constitution of 1875, when they proposed this Constitution, and the people of the State of Missouri when they adopted it, did not evince a very strong, abiding faith or confidence in the *morals* of the Legislature, or of the county court, or the city or town councils, in the matter of railway aid bonds and taxation for public improvements.

“Local assessments are constitutional *only* when imposed to pay for local improvements conferring special benefits.” The state Legislature, the city, town and village council, could not then determine these *special* benefits. That was a rule of constitutional law then. It was not intended by the framers of the Constitution of 1875 when they proposed this Constitution; it was not intended by the people of the State when they adopted it, to convert the boasted American constitutional rule into the merely moral rule of the constitutions of Europe. “Thou shalt not steal,” was intended to apply to the public as well as to individuals. It was not intended to convert that command into a mere moral rule. That boasted provision of the Constitution has now become a mere moral rule for the guidance of the thief, the public, the city, town or village council.

The people of the State, by the Constitution of 1875, decided that our state Legislatures, our county courts, our city, town and village councils, were unfit and unsafe depositaries of this power—this unlimited, limitless power—to contract debts and levy taxes to build roads and railroads.

The depositaries of this power, the legislatures, the county courts, the city, town and village councils, were largely made up (as would seem to be the general concensus of opinion) of knaves, and those not knaves were mostly fools, and both classes were unsafe depositaries of this power, and hence it was taken away. And it was never intended to allow a power worse in its consequences to remain with the same distrusted depositaries to be exercised against abutting lots on a street for building the road or street. Some comparisons follow.

CHAPTER 10.

SOME COMPARISONS.

I presume every one is acquainted with the history of Missouri under the Constitution of 1820, and subsequent constitutions of this and other states on the question of aiding public improvements. In 1865 Missouri ceased to issue state bonds for public improvements. This State then ceased to loan the state credit in aid of public improvements. The people of the State in 1865 by her Constitution put a limit on the power of the Legislature to authorize cities, towns, villages and counties to aid railroads and roads. The power to aid railroads and roads, and take stock in railroads and roads, was taken away entirely from the state Legislature. The county court for the county and the unorganized strip of land, the city, town and village council could no longer be authorized to make bonds or incur debts for public improvements or in aid of public improvements unless there was the two-thirds vote.

In ten years that became very unsatisfactory. Municipalities became largely in debt for public improvements, perhaps never made, and in 1875 Missouri by her Constitution of that year took away that power entirely, so that after that year, no difference what might be the value of a railroad to a county, city, town or village, bonds could not be issued for stock in railroads or to lend credit to railroads. The municipal bond was valid in the hands of a purchaser for value without notice, but the tax-bill is valid in the hands of the original wrongdoer who takes a contract to violate the Constitution—to do that which the Constitution says shall not

be done (Private property shall not be taken or damaged for public use without just compensation), and then this statute law authorizes a sale of the damaged property to pay the contract price to do the damage, or the contract is good if there is no benefit or even if there be a damage. No court has ever yet held valid a municipal bond given for performance of an act prohibited by the Constitution. The doctrine is monstrous. The Czar of Hell, all the arch-fiends and devils of Hell combined could not do worse!

In *Zoeller v. Kellogg*, 4 Mo. App. 163, we do not know what the value of the land was before the work was done for which the tax-bills were issued, but after the improvement it was worth \$1,025, while the tax-bill was \$1,688. Here is the actual value found by the court, \$1,025. This tax-bill is one hundred and sixty-three per cent of the value of the land and of all value added by the improvement. The reader has never known or heard of any county, city, town or village issuing railroad bonds to the extent of one hundred and sixty-three per cent of the actual value of all the real, personal and mixed property of all the inhabitants of the entire county, city, town or village. If we suppose the land was benefited one hundred per cent, then the lot was worth \$512.50, and benefit \$512.50, making the \$1,025 value. After the contractor received one hundred per cent of the value of the land and one hundred per cent of the value of the benefit, he ought to have been satisfied, but he was not. He got judgment for sixty-three per cent more on land and benefit. This rate never was exceeded or equaled by any city, town or village in Missouri or in Kansas or Colorado (not even by any county, city, town or village laid off anywhere in the prairie grass, or in the buffalo grass, or in the sage brush country, or in the alkali districts). I do not believe that the

framers of the Constitution of 1875 ever intended that this "tax on benefits" should ever equal or exceed one hundred per cent of the value of the land and one hundred per cent of the value of the benefit added. We have seen that the same rate of taxation extended to the entire State would absorb all the real, personal and mixed property of the State (not a man in the State would have a shirt on his back) and then the contractor, after he had gotten all the real, personal and mixed property in the State, would be short (poor fellow!) 567 millions of dollars. The state Legislature never issued bonds to this extent, nor did any county, city or town, nor was credit ever loaned to that extent. One instance occurred in Kansas City where the tax bill was \$700 and the lot was worth, after all improvements were made, \$400. This case was instanced in 1905, before the thirteen free-holders framing a new charter for Kansas City. Here was a tax of one hundred and seventy-five per cent on the original value of the lot, with one hundred and seventy-five per cent of the benefit added. It was not stated what the lot was worth before the work was done which occasioned this presumptive benefit of one hundred and seventy-five per cent of original value with one hundred and seventy-five per cent of the benefit added. The State of Missouri never made such a fatal mistake in issuing railroad aid bonds or lending its credit for public improvements. No county, city, town or village in this or any other state or territory ever loaned credit or issued public improvement bonds to that damaging extent.

Besides, any one at all conversant with public improvements in any city will recognize the estimate of \$700 as too low. If we estimate the corner lot as 25 by 150 feet, then we have 175 feet front to pave at five dollars per front foot, 185 feet curbing at 50 cents, 185 feet sidewalk at \$1, sewer \$40, trees \$12.50, total \$1,200, in

place of \$700. Then the lot was worth \$400. Then the lot was worth originally \$800 less than nothing. It was \$800 below zero, and that was a very cold day for that lot-owner. A lawyer, even, would not want to take for his fee a lot worth \$800 below zero. Put the lot up and sell it for what it is worth and it will pay thirty-three and one-third per cent of the special taxes against it, not allowing anything for costs of sale, abstract, certificates of judgments. Pay these costs and the property-owner will get nothing and the tax-bill holders will get less than thirty per cent of the tax-bills. The gentle reader must not forget this tax is no *burden* on the real estate owner, but just think of the poor tax-bill holder who gets only thirty per cent of his money! Before the board of freeholders in Kansas City it was stated that "countless numbers of corner lots have been eaten up with special taxes, and the owners have given them up rather than make the payments assessed against them for improvements." And this was true then, and is now, in the whole United States. In the case above referred to, where the public improvements are really \$1,200 in place of \$700, take the corner lot and the next four lots, 25 by 150 feet making 125 feet by 150 feet. The cost of the public improvement will be, at this rate, \$1,800 for the five lots. If we count the corner lot as worth \$400, this will leave \$1,400 to be paid by four lots, or three hundred and fifty dollars each. If an improved corner is worth \$400, the improved inside lots ought to be worth \$350 each. The contractor will thus be made whole except in the matter of attorneys' fees, and it will be necessary to give the contractor another 25 foot lot, and then with rigid economy the contractor might come out even. As to the owners of the six lots this tax is no *burden*. But let us make further comparisons. Public improvements on corner 150 feet will cost \$18 per front foot.

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framers of the Constitution of 1875 ever intended that this "tax on benefits" should ever equal or exceed one hundred per cent of the value of the land and one hundred per cent of the value of the benefit added. We have seen that the same rate of taxation extended to the entire State would absorb all the real, personal and mixed property of the State (not a man in the State would have a shirt on his back) and then the contractor, after he had gotten all the real, personal and mixed property in the State, would be short (poor fellow!) 567 millions of dollars. The state Legislature never issued bonds to this extent, nor did any county, city or town, nor was credit ever loaned to that extent. One instance occurred in Kansas City where the tax bill was \$700 and the lot was worth, after all improvements were made, \$400. This case was instanced in 1905, before the thirteen free-holders framing a new charter for Kansas City. Here was a tax of one hundred and seventy-five per cent on the original value of the lot, with one hundred and seventy-five per cent of the benefit added. It was not stated what the lot was worth before the work was done which occasioned this presumptive benefit of one hundred and seventy-five per cent of original value with one hundred and seventy-five per cent of the benefit added. The State of Missouri never made such a fatal mistake in issuing railroad aid bonds or lending its credit for public improvements. No county, city, town or village in this or any other state or territory ever loaned credit or issued public improvement bonds to that damaging extent.

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The assessed values of all lands in Kansas City exclusive of improvements thereon, have run thus for the years indicated:

A. D. 1904	\$36,641,430
A. D. 1900	\$36,159,800
A. D. 1886	\$31,169,190

The streets in Kansas City are thus in length: Streets dedicated or condemned, 128.7 miles; streets to be dedicated or condemned, 48 miles; total, in round numbers, 177 miles. Number of tracts in Kansas City, 73,020.

Average assessed values were thus: 1904, assessed value, \$36,641,430, or \$502 per tract; 1900, assessed value, \$36,159,800, or \$496 per tract, an increase in value in four years equal to one and thirteen sixty-seconds of one per cent or seventy-five two hundred and forty-eighths of one per cent per year.

Now let us count the cost of public improvements for Kansas City. Counting paving at five dollars per front foot, sewers at one dollar and fifty cents per front foot, sidewalks at one dollar per front foot, and curbing at fifty cents, the cost will be thus:

Paving....	\$9,329,760.	25.7 per cent of assessed value.
Sewers....	\$2,798,928,	7.6 per cent of assessed value.
Curbing....	\$932,976.	2.54 per cent of assessed value.
Sidewalks.	\$1,865,952.	5.08 per cent of assessed value.
Total cost.	\$14,927,616.	40.7 per cent of assessed value.

This counts nothing for grading.

If we count these public improvements to last ten years, then we have a tax of 4.07 per cent per annum.

Add state tax15 per cent
County tax35 per cent
School	1.00 per cent
General city tax	1.00 per cent
Public improvements	4.07 per cent
Total tax	6.57 per cent

The improvement is paid for in advance. If we count interest at four per cent on the cost of the improvement, for it lasts ten years and is paid for in advance, we must add 1.63 per cent to above 4.07 per cent making an annual tax on assessed value of 5.7 per cent as taxes on the assessed values of real estate, exclusive of improvements and not including general city taxes or general state and county taxes. Pave the alleys with the same material as the street and the cost will be \$950,400, making a total cost of public improvements, exclusive of grading and parks, \$15,878,016. This is forty-three and one-third per cent of the assessed valuation of all the land in Kansas City, exclusive of improvements thereon. Counting ten years as the life of a pavement, this is four and one-third per cent per year. This payment is made in advance, and counting interest at four per cent per annum makes for the ten years seventeen and one-third per cent additional, or about sixty-one per cent for ten years, or six and one-tenth per cent per annum on the assessed value of lands exclusive of improvements thereon. This does not include any park taxes or grading taxes or benefits to pay for damages for grading. Adding state tax, county tax, school tax and general city tax makes a land tax of eight and one-half per cent per annum. This leaves out the county bond tax. This is nearly fifty-seven times as much as the state tax. Under section 12, article 10 of the state Constitution of Missouri, adopted in 1875, the greatest amount of debt that can in any event be incurred is five per cent of the assessed value of all the property in the county, and that must be paid by a sinking fund provided for in twenty years, or one-fourth of one per cent per annum. Here is a tax per annum thirty-four times as much. At the end of ten years all the public improvements are worn out

and they must be renewed at the same cost. Municipal bonds never made such high taxes.

You will have noticed that the assessed value of land, exclusive of improvements thereon, was for the year 1904, \$36,641,430; 1900, \$36,159,800. Increase in value for the four years, \$481,630, or \$120,407 per year. This would improve 5.7 miles of street in four years or 1.4 miles per year. At that rate of increase in value, it would take 127 years to put in the public improvements in Kansas City which would last ten years. Kansas City had 73,020 tracts of land in 1904. The average value per tract in 1904 was \$502, and in 1900 it was \$496, being six dollars increase in value per tract for four years, or \$1.50 per tract per year. We have spoken of the \$1,200 special taxes against the corner lot 25 by 150 feet. The average increase in value per tract per year being \$1.50, it would take 800 average tracts to pay the special taxes on this lot, or it would require all this average increase in value for 800 years to pay these special taxes.

The per cent of increase in four years is one and thirteen sixty-secondths per cent for four years, or seventy-five two hundred and forty-eighths of one per cent per annum. This is less than one-third of one per cent. We have seen that all Kansas City can be improved with the improvements required for about sixty-one per cent for ten years, or six per cent per year on the assessed value. In the minds of the framers of the Missouri Constitution of 1875, and in the minds of the people of the State who adopted that Constitution, a debt to be paid by general taxation could not, under any circumstances, be contracted exceeding five per cent of the assessed value of all the property in the county, city or town, and that was payable in twenty years by a tax levied each year or one-fourth of one per cent per year, yet here is a tax of six per cent per

year or twenty-four times as much. Beyond one-fourth of one per cent per year for a debt was a burden not to be endured under any circumstances whatever, and yet six per cent per year is not a burden. Take lot 1 in block 2 in Coleman Place in Kansas City. Assessed value for 1904 was \$486. Assessed value for 1902 was \$460. Special taxes one year \$1,125. A similar tax on the other real estate of Kansas City, exclusive of improvements thereon, would produce the sum of \$85,496,333. Four per cent of this sum would be \$3,419,853, enough to pay for all our parks. This lot was 34 by 132 feet, making 166 feet front. This would be only seven dollars per foot front, i. e., counting 166 feet as the front; but \$33 per front foot if we count 34 feet as the front. This does not include park taxes. This lot was worth \$742 below zero, or twenty-two dollars and fifty cents per front foot below zero. This tax is no burden. In case all the property (real estate) in Kansas City should be improved like this real estate in Coleman Place, then Kansas City would be short on the tax on lands, exclusive of improvements, \$48,854,903.

Take lot 56, Windsor, in Kansas City. The lot is 30 by 150 feet and on a boulevard. It is a corner. Assessed value of land exclusive of improvements for 1904 was \$720. The special taxes levied and paid prior to 1904 were about \$1,950. They came in rapid succession. Put a similar tax on all land in Kansas City and it would produce from land values alone \$99,237,206. The gentle reader must bear in mind that this tax is no burden. This tax would be \$62,595,776 more than the entire assessed value of all the land in Kansas City, exclusive of improvements. If we say the land was assessed at forty per cent of its real value, if the contractor takes the land at its real value he will be short \$2,633,631. And the poor contractor will have to lose it!

See how this law operates on corner lots. We proceed on the lines already suggested. Take thirty-two corners. This would be eight blocks on each side. Improve sixteen of these corner lots with a sixteen-hundred dollar house. Then we have

16 houses at \$1,600, equal to	\$25,600
16 lots improved at \$400, each equal to	6,400
16 lots unimproved at \$400, each equal to ..	6,400
Total value	\$38,400

If the tax-bills are \$1,200 on each lot the contractor comes out even. The owners of the vacant lots lose their lots with original value and added value, and the owners of the houses, costing \$1,600 each, lose their houses worth \$25,600, and their lots worth \$400 each, equal to \$6,400. The contractor lost \$800 on each vacant lot of the sixteen, and he made up his loss by the sixteen houses at \$1,600 each.

Take lot 56, Windsor. Land is assessed at \$720, with all benefits added, the special taxes being \$1,950. If the owner puts up a house worth \$1,230, then the land (\$720) and house (\$1,230) equal \$1,950. The tax-bill holder gets one hundred per cent of the original value of the land and one hundred per cent of the increased value of the land and one hundred per cent of the value of the houses and the public get the highly costly street for nothing. "Tell me whether this be theft or no?"

In the actual case above cited, and the supposed case, the property was not damaged. There was some "*benefit*," but the original value of the land and the houses and the benefit all added together were less than the tax-bills.

The question is one solely of power. If the power to do the forbidden thing exists, then the question is settled. To say that the power is abused is to beg the question. A power that does not exist cannot be

abused. Every legislative enactment made without constitutional power or against a prohibition, is and ought to be void.

We have seen that a \$2,750 damage to Mrs. Smith's lot was a three-hundred-dollar benefit to her and her lot.

If they will only hang a few property-owners, the benefits to such property-owners so hung would be amply sufficient to pay off the national and state debts.

CHAPTER 11.

FURTHER CHANGES.

Within the last ten years further fundamental changes have occurred in the law of local taxation. Local benefit was formerly regarded as the sole ground or authority for the local tax. The Missouri Supreme Court state the principles on which this tax is founded, through Judge Leonard, in *Lockwood et al. v. St. Louis* 24 Mo. 20 (A. D. 1856), in a suit to enjoin the collection of a tax of one-half of one per cent to build sewers in a portion of St. Louis, under an act of the Legislature of Missouri. After observing that these taxes prevailed under the English Law, the court say:

“Their intrinsic justice strikes every one. If an improvement is to be made, the benefit of which is local, it is but just that the property benefited should bear the burden. While the few ought not to be taxed for the benefit of the whole, the whole ought not to be taxed for the few. A single township in a county ought not to bear the whole county expenses, neither ought the whole county to be taxed for the benefit of a single township; and the same principles require that taxation for a local object, beneficial only to a portion of a town or city, should be upon that part only. General taxation for a mere local purpose is unjust; it burdens those who are not benefited, and benefits those who are exempt from the burden.”

A local tax which was only a general benefit was unconstitutional. When the Constitution was changed so as to prohibit damaging private property for public use as well as taking, the tax became valid if it was

for work which *occasioned a damage*. The special, peculiar, exceptive benefit ceased to be necessary to the constitutional validity of the tax. A general benefit ceased to render the tax unconstitutional. If there was a *general damage*, the tax was constitutional. Now the latest determinations are that the courts can not inquire into the question. The legislative determination is conclusive.

“Just compensation for taking as well as damaging private property for public use shall be ascertained by a jury or board of commissioners.” In requiring a jury a judicial proceeding seems to be aimed at but we now proceed to show by what steps this portion of the Constitution of Missouri is unconstitutional according to the Constitution of Missouri, and courts and juries and commissioners are dispensed with. The whole power is in the Legislature (common council of cities) and the legislative determination is conclusive. This determination ought to be judicial and when such duty is devolved on the Legislature it is made to try to accomplish impossibilities.

Let us notice some inconsistencies into which we are driven by this theory of the conclusiveness of this legislative determination of benefits, both as to fact and amount.

In every State of the Union, streets, avenues and highways may be improved at the expense of the abutting property, even if the improvement be no benefit to the property taxed, or even a damage forbidden by the Constitution. In such case, notwithstanding the positive prohibition against the work occasioning the damage, the damaged property may be taxed to the entire extent of the whole value of the land and all buildings thereon.

Look at the inconsistencies. It will plainly appear in mathematics that the tea tax of the Revolution was

(0) zero and this tax infinity 8. We have the relation between zero and infinity.

In *State of Missouri ex rel. v. Leffingwell et al.*, 54 Mo. 458 at 473, Wagner, Judge (in an opinion concurred in by Judges Vories and Adams, Judge Napton not sitting and Judge Sherwood absent), says:

"In the construction of the Constitution I am unwilling to apply to it those elastic principles which will make it extend any required length to accomplish an end or purpose. Unless some regard is paid to the injunctions of our organic law, written constitutions of government will be regarded as of no value and the experiment of setting a boundary to capricious and arbitrary power will be a complete failure." Again continuing, the same judge says: "Nothing is better settled than that special taxation for objects that are general and public is illegal." Again, page 475: "The Constitution has wisely erected a barrier against this exorbitant power, and there is a time in the tide of this special taxation when it must be said, thus far shalt thou go and no farther."

"Local assessments are constitutional only when imposed to pay for local improvements conferring special benefits." These are the words of the same judge in the same opinion, almost in the same sentence. It was certainly intended to be affirmed by the court that there was then (in the year A. D. 1873) a constitutional barrier against local taxation. Where is it now? We had it in 1873. What has become of it? What clause or provision in the Constitution of Missouri in 1875 removed this barrier? Was it ever intended to change the language of the court so as to read thus: "Local assessments are constitutional only when imposed to pay for local improvements conferring special damages." If by fraud, accident or mistake the work for which a special tax-bill is issued should be a

special, peculiar, exceptive, benefit or a general benefit, or if it should be absolutely neutral, then the tax-bill is void; but it is a valid tax if the work occasion a special damage (as for instance \$2,750 to Mrs. Smith, that being her adjudicated damage for which she had to pay \$300 to the contractor who did the damage). Say the court through Adams, J., at page 477:

“The question in regard to taxing a particular locality for general purposes, is sufficiently discussed in the opinion under review. Private property cannot be taken for public use without just compensation. Special benefits cannot form any part of such compensation unless they attach to and become a part of the taxed property. The phrase ‘special benefits’ is a misnomer as applied here. A lot-holder has a property interest or easement in the adjoining street independent of the general public, and the improvement of the street may be a special benefit or an absolute injury to his lot. If it be a benefit he must pay for it, and a special tax may be levied on his lot for that purpose. But adjacent property-holders can have no easement or property right whatever in a park. Their interest is precisely the same as all other citizens, and a tax upon them is only a thin guise for confiscating their property without any just compensation.”

Such a tax was then unconstitutional; what makes it constitutional now? I am aware of what was said in *Kansas City v. Ward*, 134 Mo. 172, at 178-9. That case admits that there can be no local tax for a park unless there is a special benefit to the land taxed. But in this latter case the court say the person whose land is benefited by a park must pay the benefit tax, and then he has no interest in the park he has in part paid for. Public parks are a local affair almost exclusively. The public have no interest in them; it is a matter of very small concern. The courts and juries here have been required

to estimate the value of each park to the public in general, and this has to be paid first and then special benefits to each parcel of land is ascertained and assessed on the land. Public parks are here worth only a dollar each. Boulevards one dollar each. They cost more, but that is all they are worth to the city. It will take two or three parks to pay for your Christmas turkey. One live hog in the Kansas City market at the stock yards is worth more than all the parks in Kansas City and St. Louis, and the hog would be a scrub at that. Think of the small value the city or public get. A dead cholera hog is worth more to the dead-animal man than any park or boulevard in Kansas City and St. Louis. A sow and pigs, even if they are Arkansas wind-splitters, are worth more than all the boulevards of Kansas City and St. Louis.

But even according to the case of *Kansas City v. Ward*, supra, there must be a benefit special, peculiar, exceptive. It is not said here that the Legislature can determine the fact and amount of benefit. That must be done by court and jury. "A lot-holder has a property interest or easement in the adjoining street *independent of the general public*, and the improvement of the street may be a special benefit or an absolute injury to his lot." I believe the court, in *Kansas City v. Ward*, did not intend to overrule this portion of the opinion.

The improvement of the street may be a special benefit or an absolute injury to his lot. It was not then generally known among jurists and property-owners that the legislative determination to make a given public improvement was conclusive on the property-owner that it was a benefit, and of course could not be an injury. In place of being "*damnum absque injuria*," it was a benefit. Here are two interests: the public interest and the private interest. These interests may be

in conflict. What benefits one, may damage the other, even if it be "*damnum absque injuria*" as to the individual. Here are two necessities for consideration, the public necessity and the private necessity. The property-owner ought to be left free to improve his right of way appurtenant to his land. He may want that way smooth and level, or steep to throw off the water. Let him judge of his own necessities and supply them as he deems best. At the time of this decision (54 Mo. supra) it was not supposed that a local tax could, without the owner's consent, be levied on the damaged property to pay for the work of damaging the property. The public should be left free to determine what is necessary for the public, but it ought not to be allowed to determine what is a necessity to the individual, either to his house or the road or way to get to it. But this law makes the common council agent for the public and for the lot-owner. When the public interest conflicts with the private interests, the council ought to be or may be agent for either, but ought not to be agent for both. The council cannot serve God and mammon. Jesus Christ has told us that no man can serve two masters. He will love one and hate the other. The city contractor will get all the love and the property-owner will get the hatred.

The property-owner may insist on determining his own necessities in reference to his own right of way, but these public agents decide these conflicting claims, not as a judge of a court impartially and according to law and evidence, but as a legislative body. These agents cannot serve two principals having conflicting interests. It cannot be done. The judgment of Jesus Christ on this matter was excellent and commends itself to the good sense of all. To this writer it is a source of sincere regret that the courts should reverse the judgment of Jesus Christ. We sincerely regret that

His decision has been overruled and that the common councils of our cities, towns and villages are still compelled to try to ride two horses at the same time, going in opposite directions.

In *Newby v. Platte County*, 25 Mo. 258, at 261, Judge Leonard, rendering the opinion of the court on this tax power, says:

“No principle of English jurisprudence is better settled than that an individual cannot be deprived of his property except for the public use and for a just compensation, and the British parliament accordingly never authorized one individual’s property to be taken for the private benefit of another upon any terms, nor for the public use, without first providing a just equivalent for the owner.” [1 Black Com. 139.] The emphatic declaration of the French law (Civil Code, 545) is, that “No one can be compelled to give up his property [Evidently no local taxes there] except for the public use and for a just and previous indemnity.” And an anecdote by DeTott in his *Memoirs of the Turkish Government* shows that the same principle is equally respected in that despotic government.

The Sultan Mustapha, being desirous of building and endowing a new mosque, fixed upon a spot in the city of Constantinople which belonged to a number of individuals, and treated with them for the purchase of their parts. They all complied with his wishes except a Jew who owned a small house on the place and who refused to part with it for any price. The Sultan consulted his Mufti, and they answered that private property was sacred, and that the laws of the Prophet forbade his taking it absolutely, but that he might compel the Jew to lease it to him as long as he pleased *at a full rent*. The Sultan submitted to the law.

“But in Europe, this principle is in reference to the action of the government, *a mere moral rule, imposing no legal restrictions upon the legislative authority*, while the American people, by incorporating it into their Constitution and making it a rule of constitutional law of superior obligation to the enactments of the legislative department, have placed private property under judicial protection, against all efforts on the part of the government to take it from the owner, except under the circumstances and upon the terms recognized as just and proper by the general sense of mankind and the uniform practice of civilized nations; and they have thus given to private property a security altogether unknown to the legal systems of Europe. Our constitutional provision, it is true, does not, like the declaration of the French law, prohibit in express terms the taking of private property in any case except for the use of the public, so as directly to deny to the Legislature the power of transferring property from one person to another for any mere private purpose, yet all this is sufficiently implied; and accordingly in the construction of the provision it is always assumed that there must be not merely a just compensation, but that the use to which the property taken is to be applied must be a public use in order to authorize the exercise of the power.”

The rule of constitutional law has certainly been changed since July, 1857, when this opinion was delivered. We have discarded the rule there laid down and adopted the rule of European constitutional law. The rule is one of morals for the guidance of the legislative power vested in our city, town and village councils. The reader may have noticed municipal governments in the United States for thirty or forty years past. These local governments are supposed to be corrupt. Munici-

pal charters are the occasion of these rotten governments and they have occasioned more injury than all the Empsons and Dudleys of English history.

Property-owners, think of it! You hold your city property under and by the moral sense of our city legislature. These city legislatures are not governed by the Constitution. Think of the slender thread (a rotten one at that) by which you hold your property. Your right to hold city real estate is reduced to this exceedingly attenuated shadow. For several centuries it has been a favorite theory of publicists and writers on international law that if all the thieves were put on an island, fertile in all resources for human needs, surrounded with ships of war to prevent any possible escape, and if they were supplied with all implements of industry, they would soon make and enforce laws against stealing and in favor of honesty. We ought all of us to congratulate ourselves on our near approach to the long-expected—the long-looked-for millennium.

In all the states the constitutional provision is that private property shall not be taken or damaged for public use without just compensation paid in advance to the owner or into court for the owner. These questions arise: Who is owner? What is compensation? What compensation is just? What is a taking? What is a damaging? Can the common council of any city determine who is owner of certain land within the corporate limits so as to bind all claimants and prevent any other inquiry, on that question, in the courts? Can the common council determine that the compensation is just or that there is just compensation, or that the land is not taken or that the land is not damaged, whether there is a damage or not, is that a question for the common council or the court? What is the meaning of the Constitution on this point? If the common council can determine that the thing done or proposed is a

benefit, then it cannot be a damage. Property cannot be damaged by a benefit or benefited by a damage.

In *Barber Asphalt Paving Company v. French*, 158 Mo. 534, the invalidity of the special charter of Kansas City was especially pleaded; the answer set up that the charter pretended to authorize, and in form authorized, the improvement of a street and an assessment of the cost thereof (not benefit) on the adjoining property according to frontage, whether benefited or not; and in cases where the property was in fact damaged, and that to the extent of the excess of the cost of the work over and above the special benefits to the adjoining property the assessment constituted a taking of private property for public use without just compensation; and that such taking of private property for public use without just compensation constituted a case wherein the State of Missouri, through the Kansas City Charter, deprived the citizen of his property without due process of law. The plaintiff offered evidence that these lots were benefited to the extent of the cost of the work; this evidence was objected to as incompetent; the objections were overruled and this was assigned for error in the court above (Supreme Court of Missouri).

In passing on this question the Supreme Court of Missouri say (158 Mo. 534, at 556):

“As the assessment was made in strict compliance with the charter and ordinance, we do not think the testimony of the four witnesses to the effect that the benefits to the lots exceeded the cost of the improvement could cure the vice, if any, in the charter and the ordinance. Plaintiff must stand or fall by the charter provision. The admission of the evidence, however, did not constitute reversible error, as we hold the charter and the ordinance were sufficient without the evidence and *would have been had it been to the contrary.*”

Again page 553 say the court:

“At that time [*Davidson v. New Orleans*, 96 U. S. 97 (A. D. 1896)] it is clear that the whole court held that the fact that an assessment was for an improvement, which in fact was no benefit to the property owner, did not bring the case within the fourteenth amendment and it would be hard to conceive of a harder case.”

Speaking of the act of Congress involved in *Parsons v. District of Columbia* and the Kansas City Charter, the Missouri Supreme Court, at page 551, say:

“In neither case is there any inquiry as to benefits, nor is the tax levied according to actual benefit, but both alike rest upon the conclusive presumption indulged by Congress in the one case and the charter in the other, that such an improvement is a benefit to the abutting property.”

“Not only is this true, but the Supreme Court of the United States is solemnly committed to the doctrine that if the assessment actually exceeds the cost of the work, it would not vitiate or annul the assessment.”

Again on page 548:

“But in taxing the citizen with his proportionate share of the cost of a pavement abutting on his lot, there is no taking of property for public use.” This of course means according to the frontage of the property or the area. The proportion is obtained in several ways. First, it may be in proportion to the value of the property taxed; second, it may be in proportion to its frontage; third, it may be in proportion to area; fourth, it may be in proportion to the benefit (“It ought to be according to the value of the benefit to be derived,” was the language of the court in 1858, in *Egyptian Levee Company v. Hardin*, 27 Mo. 495, at 496, near the bottom of the page).

If we adopt the rule above enunciated, “according

to the value of the benefit to be derived," then by the construction put on the language of the law the benefit must be special, peculiar, exceptive, and a general benefit will not support the tax. Such tax will be taking private property for public use without just compensation. If there be no special, peculiar, exceptive, benefit there can be no tax in case the tax is according to benefit. Such tax-law would be unconstitutional in that it would take private property for public use without just compensation. Let us levy a special tax to grade a street. Here the work may be, first, general benefit; second, a special, peculiar, exceptive, benefit; third, it may be no benefit, special or general; fourth, it may be a damage. When the statute taxes the owner of abutting property or any other property, or the abutting property or any other property in any one of the four cases named except the second, and when a sale and deed are made conveying the title, then the owner has certainly lost his land—and what did he get for it? But here the decision is, "There is no taking of property for public use."

If the work be only a general benefit, or if it be no general benefit or special benefit, or if it be a damage, what possible difference does it or can it make whether the tax be according to value or according to frontage or according to area? Here is real estate worth \$1,025. Here is a tax against it of \$1,488.16, with interest added \$1,642.55; what difference did it make to Mr. Kellogg (*Zoeller v. Kellogg*, 4 Mo. App. 163) whether this tax be levied on his land according to frontage or according to value or according to area; by the square foot or by the square yard.

When they paved the street in front of Mr. Kellogg's property, worth with the improvement \$1,025; when they entered a judgment against it for \$1688, sold it and made a deed for it conveying away Mr. Kel-

logg's title, they would not have taken private property for public use according to this rule of constitutional law. (Of course Kellogg's land was not sold in that case; the judgment was that it could not be sold, but this case has been overruled and the land would have been sold under the present course of decision.)

In the case under consideration, 158 Mo. at 542, the court say:

"In the condemnation proceeding proper [referring to *Norwood v. Baker*, 172 U. S. 269], the jury assessed her compensation at two thousand dollars and that sum was paid her, and thereupon the village council assessed her with the two thousand dollars and all the costs of the condemnation, amounting to \$218.58 as *benefits* to her abutting property. The result was that the village acquired her property for nothing and charged her \$218.58 for having deprived her of it."

How could that be if both sums were benefits? If the two thousand dollars and the two hundred and eighteen dollars and fifty-eight cents were benefits, why could they not be charged against the land? [Kansas City damaged Mrs. Smith's land to the extent of \$2,750, and made her pay three hundred dollars for doing the damage (128 Mo. p. 23; 67 Mo. App. 205).]

The above language of our Missouri Supreme Court is inaccurate and tends to mislead. Mrs. Baker is charged to have been assessed "with \$2,000, and all the costs of the condemnation amounting to \$218.58 as *benefits to her abutting property*." What possible objection could be urged to such proceeding if Mrs. Baker's property was benefited to that extent or to a greater extent, if such benefits were special, peculiar, exceptive?

The city council of Norwood had power to assess this tax in several ways: First, as a general tax on all the property of the village; second, they might as-

sess it on the adjoining property according to the value of the property; third, they might assess it on the adjoining land according to the benefit conferred on the adjoining land by the improvement (and here the benefit must be special, peculiar and exceptive); fourth, they might assess it on the abutting property "by the front foot of the property bounding and abutting upon the improvement" (*Norwood v. Baker*, 172 U. S. 269, at 273). This \$2,218.58, it is said, was ordered to "be assessed as a benefit to her upon her land abutting upon the land so taken" (158 Mo. 542). The tax was held invalid and a sale of the land (supposed to be benefited) was enjoined because the land was not assessed according to benefit. "The result was that the village acquired her land for nothing and charged her \$218.58 for having deprived her of it."

The writer is unable to understand how it can fairly be said "that the village acquired her property for nothing," when the village paid her \$2,000 for it, the full assessed value thereof, the verdict being acquiesced in both by the village of Norwood and by Mrs. Baker. Mrs. Baker did not sue for the value of her land taken for public use, and fixed in amount by the court and jury under the laws of Ohio. If she had sued for the money, the village of Norwood would have successfully pleaded and proved payment. The village "charged her \$218.58 for having deprived her of it" (her land).

What land did they deprive her of? What land did the village of Norwood acquire for nothing? Certainly not the land embraced in the street and condemned, for that was paid for in full. The strip condemned and paid for was 50 by 300 feet, Mrs. Baker owning the land on each side of the street. Suppose that Mrs. Ellen Jones had owned this strip of land 50 by 300 feet, and it had been condemned and "just compensation" assessed at \$2,000, and paid to Mrs. Jones; could it have been fair-

ly said that the village acquired Mrs. Jones' land for nothing and charged her \$218.58 for having deprived her of it? Mrs. Baker's land was taken for public use at a price (paid) satisfactory to her and the village of Norwood. The 50 by 300 feet strip of land belonging to Mrs. Baker was taken for public use but not without "just compensation."

It was undoubtedly taken for public use but "just compensation" was paid to her for it. No wrong was done or attempted to be done under the power of "eminent domain" so far as this strip of land (50 by 300 feet), belonging before the condemnation to Mrs. Baker, was concerned. The private property of Mrs. Baker, other than this 50 by 300 foot strip, was about to be taken for public use without just compensation. This land, so threatened to be taken for public use without just compensation, was not the 50 by 300 foot strip of land condemned and paid for for the avenue opened, but it was the adjoining or abutting property belonging to Mrs. Baker, the sale of which for this local tax was enjoined. Mrs. Baker enjoined the sale of her land. The injunction was made perpetual. Suppose the injunction had been dissolved and her land had been sold for \$2,218 and costs of sale, then she would have lost the land in the street or the \$2,000 she received for it, and would have had not a cent left and no land. She lost her adjoining land under the tax-power and this included \$2,000 condemnation money for the land taken for the street.

"A public improvement having been made, it is beyond question a legislative function (and a common council duly authorized as in this case has legislative powers) to determine the area benefited by such improvements and the legislative determination is *conclusive*." [Dissenting opinion in *Norwood v. Baker*, 172 U. S. at "4th" p. 297.] "The legislative act charg-

ing the entire cost of an improvement upon certain described property is a legislative determination that the property described constitutes the area benefited, and also that *it is benefited to the extent of such cost.*" [Same opinion, p. 299.] Again, page 300: "Here the plaintiff does not allege that her property was not benefited by the improvement and to the amount of the full cost thereof." Why allege that her property was not benefited when the legislative act concludes her on that subject? If there had been incontestible evidence that Mrs. Baker's land had been benefited to the extent (say) of five thousand dollars, no one can see any reason against a tax on her adjoining land of \$2,000 for land taken and \$218 costs.

"It seems indisputable that if no inquiry into benefits was required in the Parsons case (170 U. S. 54), and that act was constitutional, neither can the charter and ordinance of Kansas City which also provide a comprehensive system of improvements be held unconstitutional. In neither case is there any inquiry as to benefits nor is the tax levied according to actual benefit, but *both alike rest upon the conclusive presumption indulged by Congress in the one case and the charter in the other, that such an improvement is a benefit to the abutting property.*" [*Barber Asphalt Paving Co. v. French*, 158 Mo. 534, at 551.]

"It is true that in many jurisdictions, certainly in this State it is true, that municipal acts, whether in the form of ordinances or resolutions, may be impeached for fraud at the instance of persons injured thereby." [Ib., p. 547.]

If there is a conclusive presumption that the property-owner has been benefited, how can he prove he has been injured? How can the legislative act be impeached? A fraud which is a benefit to the party de-

frauded is something rather new in modern law and is peculiar (so far) to tax-bills.

"But aside from this, the question of whether the plaintiff's lots would or would not be benefited by the construction of this sewer, is a legislative and not a judicial question, and the municipal legislature adjudged that they would be benefited, and fixed the ratio of such benefit when it established the joint sewer district, and as there is no question of fraud or oppression of the municipal assembly in so passing such ordinance (even if such allegation would convert the question into a judicial one, as to which it is not now necessary to decide) *such judgment of the assembly is conclusive.*" [*Prior v. Construction Co.*, 170 Mo. 439, at 451, bottom.]

This theory of a conclusive presumption of benefit is contrary to the previous holding of the courts. The courts had held (A. D. 1884) that a defendant in a suit on a tax-bill may "entirely defeat a recovery by *overthrowing the theory of benefits conferred*" [*City to use v. Ridenour*, 84 Mo. 253, loc. cit. 261]. How can this be done if there is a legislative, conclusive presumption of benefits? Shortly afterwards the court below "refused to allow defendant's offer of testimony to show that the lot was not benefited by the improvement, but that *its value was entirely destroyed thereby.*" [*Moberly v. Hogan*, 131 Mo. 19, loc. cit. 22 bottom, and top 23.] The inconsistencies involved in constitutional law on this subject are treated further in the next chapter.

CHAPTER 12.

RESULTS—INCONSISTENCIES.

In the Constitution of Missouri, the clause as to damaging private property for public use was first introduced in 1875. Prior to that time the State, or any corporation under its authority, might improve a public highway by lowering or elevating the grade or by cuts and fills so as to destroy all access to abutting property. Such cases were called "*damnum absque injuria*." A notable instance occurs in *St. Louis v. Peter Gurno*, 12 Mo. 414, et seq. (A. D. 1849). The suit was for damages occasioned in 1843 to Mr. Gurno's property by "*grading and paving*" certain streets adjoining this property. After reciting the evidence, the reporter says, p. 416: "And thereupon the jury found the defendant guilty, and assessed the damages at \$1,675." As a matter of fact, Mr. Gurno's property was damaged to that extent, but the court reversed the judgment, holding that even if the city of St. Louis did injure Mr. Gurno to that amount, still he could recover nothing. The city had a right to ruin his property without being liable for anything.

Taylor et al. v. St. Louis, 14 Mo. 20, was a suit of like character decided in 1851. The amount of damage is not stated as the court below must have followed *St. Louis v. Peter Gurno*, supra; the first lines of the opinion so state. Say the court in *Taylor v. St. Louis*, 14 Mo. 20, at 24:

"To grade a street or alley already dedicated to public use is not an exercise of the eminent domain, so as to require compensation. [Is it now?] It is not appropriating private property to public use, but sim-

ply an exercise of power over what is already public property."

"To grade a street" is certainly not an exercise of eminent domain; it is certainly not an exercise of the tax power. The language of the court may be susceptible of two meanings. We apprehend the meaning is that "to grade a street or alley already dedicated to public use is not an exercise of the eminent domain *and does not require compensation.*" The writer is not aware of any case where the eminent domain can be exercised without compensation. St. Louis, under an act of the Legislature giving (in form at least) the authority, established a building line on one of her boulevards. The ordinance provided that no building should be erected on any adjoining lot within forty feet of the street line, and that if any one violated the ordinance he should be fined and the building torn down. One of her citizens owning a lot built within fifteen feet of the street; he was arrested and fined in police court, and fined in the criminal court on appeal to that court, but the judgment was reversed in the Supreme Court. [*St. Louis v. Hill*, 116 Mo. 527.]

If the council may prevent his building on the front forty feet, they may prevent his building on the back forty feet, or the middle forty feet. They may prevent his building on the whole lot or any part of it. The council may compel him to "cut the weeds" on his lot and enjoin him to "keep off the grass," and fine him \$300 per day if he fails to "keep off the grass." The right to build on this forty feet is property. That property under the act of the Legislature and the city ordinance was taken, and yet there was no exercise of the eminent domain. There was no condemnation proceeding. In the Gurno case the court say that the act complained of is merely an exercise of power over what is already public property. But the modern law goes

further. Mr. Gurno's property was damaged by paving and grading to the extent of \$1,675. St. Louis paved and graded this street at some cost which she can pay only by a tax, special or general. If Mr. Gurno's lots had been sold to pay for this grading and paving, and his title passed to others, he has certainly lost his property by the deed to the purchaser and the city got the money which it used, to pay the cost of this grading and paving. In theory, his property has not been taken (only damaged) for public use. This is a refinement of the law which is a practical robbery of the owner. On this modern doctrine of a conclusive presumption of benefit, both as to the fact and amount, I wish to call attention to two cases (referred to heretofore) reported in Missouri Reports: *Smith v. Kansas City*, 128 Mo. 23, and *McQuiddy v. Smith*, 67 Mo. App. 205, et seq., the first decided in 1894 and the second in 1896. The facts in brief were these.

On March 2, 1889, Kansas City by ordinance of that date established the grade of Locust street in Kansas City in front of Mrs. Smith's house at about fourteen feet below the natural surface, and on January 3, 1890, the city by ordinance provided for cutting down the street in front of plaintiff's property to the grade so established. The city through its contractor in September and October, 1890, graded the street to the grade so established. Mrs. Smith (in *Smith v. Kansas City*, 128 Mo. 23) claimed that her property was by such grading damaged to the extent of five thousand dollars, for which amount she brought suit against the city. She secured judgment against the city for \$2,750 and the city brought the case to the Supreme Court on appeal. The plaintiff gave evidence tending to show that her property was damaged. Says the report: "The defendant introduced evidence tending to prove that the effect of the grading was not to depreciate but

to increase the market value of the property" (128 Mo. 28). The jury rendered a verdict for the plaintiff for \$2,750 and the Supreme Court affirmed the judgment.

When the work was completed under contract and ordinance, tax-bills were issued but these tax-bills were held void in *McQuiddy v. Vineyard*, 60 Mo. App. 610, because the proper officer did not sign them. The tax-bills were reissued and one of them formed the basis of the suit in *McQuiddy v. Smith*, in 67 Mo. App. 205, et seq. The contractor sued on the tax-bills reissued for grading the street, which grading caused the damages of \$2,750, decided in *Smith v. Kansas City*, in 128 Mo. 23. In the circuit court, judgment was rendered for the contractor for the amount of the tax-bill, with interest and costs, and this case was taken by appeal to the Kansas City Court of Appeals where the judgment was affirmed. The decision is put on the ground that the fact that the grading damaged and did not benefit the lotowner was no defense. The tax-bill amounted to three hundred dollars, as I am informed by counsel. The decision construes article 8 of the Kansas City Charter of 1889. The result of the two cases was that the street in front of Mrs. Smith's lot was graded to her damage in the sum of \$2,750, and she had to pay three hundred dollars for having her property damaged to that amount. Compare these two cases (especially *McQuiddy v. Smith*, 65 Mo. App. 205) with *Walther v. Warner*, 25 Mo. 277, and *Powers v. Hurmert*, 51 Mo. 136. They are the antipodes of each other. In the one case the trespasser is answerable to the landowner for the damage done. In the other case the landowner must pay damages to the trespasser.

Under the old law the trespasser pays damages; under the new law he receives damages. Under the

old law the landowner received damages; under the new law, he pays damages.

Say the Supreme Court in 25 Mo. 277, at 283:

“The facts may be stated in a few words: the suit is for alleged trespasses committed by the defendants in constructing the Pacific railroad upon the plaintiff's ground before the company had commenced proceedings against the plaintiff to acquire title to it, although afterwards and before the present suit was commenced they did institute such proceedings, and so conducted them that during the progress of this suit a judgment was rendered against the company for the assessed damages, and an order was made vesting the title to the land in the company. In the course of the present suit the defendants amended their answer, alleging the institution of these proceedings to acquire title, and that they were yet pending and being prosecuted by the company with reasonable diligence to a termination. The court refused to strike out this amended answer, admitted these proceedings in evidence on the trial, and directed the jury substantially that if the company had located their road on the plaintiff's land, and the trespasses complained of were necessarily committed by the company's contractors in the construction of the road, the plaintiff could not recover on account of such acts. It is thus seen that the practical question in the case is, whether the legislative acts, to which we have referred, any or all of them justify the alleged trespasses, and we are of the opinion that they do not; and that therefore, the judgment must be reversed and the cause remanded and in this we all concur.” The defendants, the railroad contractors were held liable for the trespass committed.

In *Powers v. Hurmert*, 51 Mo. 136, the Quincy, Missouri and Pacific Railroad Company constructed a railroad on and over the lands of the plaintiff, Rich-

ard L. Powers, in Adair county, Missouri. The defendant, the contractor for grading the railroad, in the prosecution of his work under his contract, tore down plaintiff's fence on the railroad right of way. The right of way was part of the cultivated land of the plaintiff, Mr. Powers, and was in his possession and use. The railroad company had filed their suit to condemn this land, the landowner appeared to the suit and commissioners to assess damages had been appointed and these commissioners had assessed Mr. Powers damages at \$200. Their report had been filed and no exceptions thereto had been made. Then the contractor tore down the fence. A few days after the contractor tore down the fence, the money was paid into court by the railroad company for Mr. Powers, the landowner, and Mr. Powers accepted the two hundred dollars giving his receipt therefor and sued the railroad contractor in trespass for tearing down his fence. He recovered ten dollars before a justice of the peace and on appeal to the circuit court the landowner again had judgment and the contractor took the case by appeal to the Supreme Court, where the judgment was affirmed. This case was decided at the October term, A. D. 1872, three years before the adoption of the Constitution of 1875. In rendering the opinion, the court, at page 137, et seq., say:

“The only question presented is, whether the agreed case warrants the judgment. It is contended that the reception of the money allowed by the commissioners on the condemnation of the property was a waiver of the alleged trespass. It is agreed that the trespass was committed and the liability incurred before the condemnation was perfected by the payment of the money. It may be remarked that the taking of private property for public use is in the nature of a forced sale. The owner is compelled to part with his

property at the price assessed. The whole proceeding is *in invitum* and he is forced to take the assessed price, *nolens volens*. So, in accepting the price which is forced on him, he agrees to nothing, and waives no previous right that may have accrued to him, nor does the condemnation relate back so as to justify a previous trespass. Relation is sometimes allowed to prevent injustice, as when an attachment has been issued and levied without sufficient affidavit, and an amended affidavit is afterwards made it will relate back, so as to uphold the attachment and justify the previous levy, but in that case the right to the attachment and its levy existed at the time and only lacked the formality of a sufficient affidavit. *The right to invade the plaintiff's property had no existence till the condemnation was complete by payment of the assessed price.* [See *Walther v. Warner*, 25 Mo. 277.]”

Judge Adams wrote this opinion, concurred in by Judge Wagner, and the case was approved in *Powers v. Hurmert*, 51 Mo. 152: “Private property shall not be taken or applied to public use without just compensation,” was the old Constitution of Missouri. The new Constitution changed the language materially: “Private property cannot be either taken or damaged for public use without just compensation,” and the framers of the Constitution added that until this “just compensation” (either for taking or damaging) shall be paid to the owner, his proprietary rights shall not be divested and the owner shall not be disturbed. The owner’s title cannot be divested without payment in advance; the owner cannot be disturbed without payment in advance. The owner is just as much entitled to “just compensation” in advance for damaging his private property for public use, as he is entitled to “just compensation” in advance for taking his private property for public use.

Now, "payment of the assessed price" for damaging is just as necessary as "payment of the assessed price" for taking. "The right to invade the plaintiff's property had no existence till the money was paid;" the right to disturb the owner had no existence till the money was paid. Both rights are conferred in the same sentence in the Constitution. The constitutional provision is:

"That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested?"

Judicial questions may arise under this constitutional provision or any other statute. To determine what the law is, is of the very essence of judicial duty. To determine what the law shall be is of the very essence of legislative duty. These questions may arise:

1. What is private property?
2. Who owns it?
3. What is taking it?
4. What is damaging it?
5. Is a given taking for public use?
6. Is a given damage for public use?
7. What is just compensation?

The Constitution evidently contemplates judicial action in each of the seven cases noted, and, it may be, in others. The writer has not undertaken to name all the cases in which judicial action must be taken. If the Legislature has the power to determine what is "just compensation" and does so determine, then there is nothing left for court or jury or commissioners to do. They have no jurisdiction. If the Legislature has

the power to determine and does determine that certain acts are not a taking of private property for public use, then there is nothing left for the courts to do. If the Legislature has the power to determine and does determine that certain acts by certain ordinances and laws do not damage private property, then the court, jury and commissioners have nothing to do. There can not be just compensation for damaging private property which is not damaged. There cannot be just compensation for taking private property which is not taken. Either the Legislature must determine what is a taking, what is a damaging, and what is just compensation, or it must be done by court and jury. There can be no middle ground.

There can be no tax without statute authority. There is no common law for taxation. One theory is that the Legislature determines finally and conclusively the fact and amount of benefit. How can there be just compensation for damaging property which is benefited, and if it is benefited how is it damaged? Here we have the legislative determination that Mrs. Smith's land was benefited to the extent of the amount of the tax-bill (\$300), and that legislative determination is conclusive. We have the judicial determination that Mrs. Smith's land was damaged to the extent of \$2,750, and this judicial determination is conclusive. So Mrs. Smith compels Kansas City to pay her \$2,750 and costs for having benefited her property \$300. The legislative determination of the fact and amount of benefit are conclusive for it rests alike "*Upon the conclusive presumption indulged by Congress in one case and the charter in the other, that such an improvement is a benefit to the abutting property*" (158 Mo. 551).

Here the conclusive legislative determination was first made that Mrs. Smith's abutting property would be benefited to the extent of the cost of the work; then

the city did the work and thereby damaged Mrs. Smith's abutting property to the extent of \$2,750, for which in a suit against the city she recovered that amount, thereby conclusively proving that Mrs. Smith's property was damaged to that amount, the conclusive legislative determination still remaining in force that this same property was by the same (damage) act benefited \$300.

It does seem a monstrous injustice to compel Kansas City to pay Mrs. Smith \$2,750 for conclusively benefiting her property to the extent of \$300. And it seems a monstrous injustice to compel Mrs. Smith to pay three hundred dollars for damaging her property \$2,750, the damage being absolutely conclusive in fact and amount.

The regular course is this under the Kansas City Charter of 1889: First, the ordinance to grade is passed. Second, the ordinance is filed in the circuit court with a petition and notice is given Mrs. Smith to appear, and if she claimed damages she must state the amount. (Here Mrs. Smith was not a party and had no notice and was not bound and hence the suit for damages was brought after the damage was done.) The regular course was then to appoint commissioners who would ascertain if there were any damages and how much, and then when these damages are paid (say \$2,750, as found by court and jury) then the grading proceeds and when completed Mrs. Smith must pay \$300 benefit for doing her property this \$2,750 damage. In this law (including in the term "law" the Constitution and the charter of Kansas City), it is absolutely conclusive that this property was conclusively benefited to the extent of three hundred dollars by an act which was a conclusive damage to it of \$2,750. Conclusive damages to personal property may be converted into conclusive benefits at no distant day. In

this case the net result was that Mrs. Smith's property was damaged \$2,750, for doing which damage she had to pay \$300.

The city can do no act except by agent. For doing wrongful acts both principal and agent are liable to the party injured for the injury done. This has been the general rule of law in all cases, but here we have an exception. Here the contractor, the agent does the prohibited act and must be paid for it. You cannot damage private property for public use, but you may hire it done, and the laborer is worthy of his hire; and the damaged property must pay the damaging contractor his full hire for injuring the owner's property.

It is true that Mrs. Smith recovered \$2,750 from the city, one of the wrongdoers, but this was only after a long and expensive litigation and after her property had been disturbed contrary to the intent of the Constitution, which plainly requires payment in advance of the taking as well as in advance of the damaging. If the State of Missouri had done this act of damaging, then the State cannot be sued as Kansas City was sued in *Smith v. Kansas City*, 128 Mo. 23. If the land had been taken perhaps ejectment would lie against any person in possession, but here damage has been done, damage forbidden by the Constitution; the property cannot be restored undamaged to the owner. The State's agent or contractor can sue the owner of the damaged property and recover his contract price to the full extent of the value of the land and all improvements on the land, and yet that same tax if levied according to benefit would have been unconstitutional if the work was a general benefit to the lot. Just think of it! That tax-bill would have been unconstitutional if it had been a general benefit. This \$2,750 damage was the only thing that saved this \$300 tax-bill from being unconstitutional.

In *Keith v. Bingham*, 100 Mo. 300, and *Smith v. Kansas City*, 128 Mo. 23 (both grading cases, i. e., taxation for grading), it was not the local tax or special tax-bills that did the damage—it was the grading. The issue of the special tax-bills was not a benefit or damage. If the grading did a damage, the special tax-bill did not increase or diminish it or convert the damage into a benefit. The damage would have been the same if the special tax-bill had never been issued.

In *Smith v. Kansas City*, 128 Mo. 23, if Kansas City did not violate the Constitution, how could Mrs. Smith get a judgment against the city for \$2,750. If Kansas City did violate the Constitution, how can she tax for it? How can she tax the very person and property intended to be protected? If Kansas City did not violate the law, how could Mrs. Smith get a judgment against the city for \$2,750? If Kansas City did violate the law, how can she tax the injured person and the injured property to pay for it? If Kansas City did not violate the Constitution or the law, how can there be a judgment against the city for \$2,750? If she did violate the Constitution or the law or both, how can she tax the injured owner or injured property for it? It was the very object of the Constitution to protect Mrs. Smith and her property. Our cities can take private property for public use without just compensation, else why the prohibition? Why prohibit damaging private property for public use if it cannot be damaged? Why prohibit an act that cannot be done? If the thing cannot be done, why prohibit it? Why make the prohibition? The English Parliament cannot do an act physically impossible; our cities can. Here we have \$2,750 as the damage of a benefit, and \$300 as the benefit of a damage. The English Parliament cannot make a \$2,750 damage to a person or his property a \$300 benefit to that person or his property; our North American cit-

ies, towns and villages can. This is worse than a South American revolution.

This doctrine is the quintessence of malicious anarchy in its most hideous form. It betokens a return to savagery and barbarity. The most absolute and despotic government on earth never has done and never can do worse. The arch fiends and devils of hell, with all their legendary tendencies to evil, cannot equal much less excel it!

"Property which is wholly and exclusively within the jurisdiction of another State received none of the protection for which the tax is supposed to be the compensation." [*Union Transit Company v. Kentucky*, 199 U. S. 194, l. c. 204 (Temp. Nov., 1905).] But if the State, the city, town or village (the protector) had damaged the property to be protected, then this traitor, Judas-like, has the power to tax. This corporation, the creature of Kentucky statute law, has grown beyond its creator. Say the court in effect:

These Kentucky cars were used in Illinois and taxable in Illinois only. If these Kentucky cars received protection from Illinois law; if they received a benefit from Illinois law, the cars ought to pay for the value received. But should that prohibit Kentucky from taxing these cars also if Kentucky benefited the cars or their owner?

Is it no benefit to this Kentucky corporation for the State of Kentucky to confer on it the power to hold and use these cars? Illinois ought yet to pass a law to tax Dr. Emerson for two years for holding, owning and using his slaves, Dred Scott and his wife and two children, at Rock Island, Illinois. Dr. Emerson surgeon, in United States Army was protected in his property in these slaves and he ought to pay a tax in Illinois for it. Would such taxation in Illinois ex-

clude Missouri from taxing these slaves? Slaves were no more movable than railroad cars, perhaps not as much [*Dred Scott v. Sanford*, 19 Howard 393, et seq.] The State of Missouri through the Kansas City Charter and her council damaged Mrs. Smith \$2,750 and the tax was valid. Kentucky refrained from damage—conferred a benefit—and her tax was invalid. Such is the irony of fate.

CHAPTER 13.

EXISTING STATE OF CONSTITUTIONAL LAW, AND REMEDIES PROPOSED.

We have seen that the Missouri Constitution itself places limitations on the amount of state taxes, county taxes, city, town and village taxes that may be levied under legislative authority. No limitations would exist but for these constitutional prohibitions or restrictions. Every Legislature of every State in the Union has had and has the power to limit the amount of taxes to be levied by counties, cities, towns and villages, including special taxing districts to be formed at the pleasure of the Legislature (with such powers and with such limitations as the Legislature may provide).

Under article 8, section 9 of the Constitution of New York, the New Lork Legislature may authorize a county tax of one hundred per cent. The Legislature may authorize an assessment of one hundred per cent. The Legislature shall pass laws to restrict these various taxes and assessments and debts. The Constitution of New York does not restrict cities in making debts or levying taxes or in making local assessments. In New York a city tax may be fifty per cent of all taxable property, so far as the New York Constitution is concerned. The Legislature shall limit city debts, taxes and assessments. Suppose the Legislature does not act—does not limit—then the power is without limit. There is no power in the State to compel the Legislature to act and fix limits. The courts cannot mandamus the Legislature to act: one co-ordinate branch

of the government cannot compel another equal co-ordinate branch of the government to act; the judicial department cannot sustain a writ of error against the legislative department. When the New York Legislature authorizes an assessment (local) of one hundred per cent to pay for a local improvement, and the city makes it, then the New York Legislature did just what the Constitution gave them authority to do, and the city did just what the Legislature intended them to do. In creating debts, in levying assessments, and in levying taxes, the cities of New York and the Legislature of New York are not governed by the Constitution of New York, according to the plain terms and meaning of that instrument.

In Missouri, cities may be authorized to levy one per cent only; in New York it may be one hundred per cent. The New York Legislature may authorize a debt of one hundred per cent of the whole property; here in Missouri it can never exceed five per cent. In New York the tax, the assessment, can take it all; in Missouri only five per cent. But in Missouri it is only in these latter days that the cities, towns and villages were judicially authorized to damage property fifty per cent and then tax the damaged property fifty per cent to pay the damages.

The New York Constitution requires her Legislature to restrict the power of assessment, taxation and creating debts "*So as to prevent abuses in assessments and contracting debts by such municipal corporations.*" The Missouri Constitution fixes the limit; the New York Constitution does not. The Missouri Legislature cannot go beyond the constitutional limit in her Constitution; in New York there is no constitutional limit at all, either on the Legislature or the cities; on the contrary, the command in the New York Constitution to the New York Legislature is, to fix the limit; other-

wise none exists. There is no way to compel the Legislature to make any limit or to pass any law.

The New York Legislature must restrict certain powers so as to prevent abuses, etc. This means that there may be abuses, as for instance, when the tax is for more than the value of the property for a work which was an injury to the taxed property. The Constitution does not restrict so as to prevent abuses. The danger of abuse is admitted. The fact of abuse is admitted. New York may abuse a granted power. The Missouri Constitution prohibits this power which the New York Constitution directs her Legislature to so restrict as to prevent abuse. A prohibited power cannot be abused; a granted power may be abused.

The decisions of the courts of those states whose constitutions do not contain provision like that of New York, give no reasons for so holding except that the courts have always so held. Each decision of each court is a mere "*brutum fulmen*."

In *Inhabitants of Palmyra v. Morton* (A. D. 1857), 25 Mo. 593, at 595, the Supreme Court of Missouri say:

"Though the public convenience was promoted by making the pavement on the street designated in the ordinance, yet it was essentially a local improvement and it was proper that the owner or occupant of the property fronting on it should bear the burden of its cost," referring to *Lockwood v. St. Louis*, 24 Mo. 20 (A. D. 1854). The action of debt was given against the owner or occupier. There was no lien on the land to be enforced. Continuing the court say:

"Examples of local assessments for partial improvements are familiar in the legislation of states and municipal corporations. The subject has been thoroughly discussed and every principle bearing on it severely analyzed in almost every state of the Union where the power has been exercised; and it is now as

firmly established as any other doctrine of American law." [25 Mo. supra.] This law was enacted in 1845 (Laws of Missouri 1845, p. 151) twenty-four years after the admission of the State. The ordinance was enacted and the work done in 1853. This statute made the owner personally liable—now repudiated. This statute made the mere occupant personally liable; the mere occupant was personally liable.

Each county builds its own jail and court-house [Just think of being close to a jail; what a transcendental advantage that is to a man and his wife, raising the family of boys and girls], erects bridges and opens roads, and the expenses for such purposes are defrayed by a county tax. Public roads are worked and kept in repair by the inhabitants of particular districts; marshes are drained and river banks are leveed and the expenses of these improvements are charged upon the persons in the vicinity, although the public is benefited by them. So in towns, wells and cisterns are dug and kept in repair at the expense of particular limits; and in cities, public parks and wharves are established, streets are opened and paved, sewers are made, water pipes are laid and the expenses thereof are charged to the *property-holders immediately benefited thereby*. It is the exercise of the same power that authorizes districts, counties or towns to subscribe for public improvements. [27 Miss. 224; 5 Gilm. 405; 1 McCook 77; 9 Ben Monroe 526; 9 Humph. 252; 4 Coms. 423.]"

Here is a clear analogy between tax-bills and municipal bonds. Here it is said that this sidewalk was "essentially a local improvement and it was proper that the owner or *occupant* of the property fronting on it should bear the burden of its cost."

The liability is on the *occupant*. We must intend that the court meant to include a lawful occupant in possession as tenant. On this subject the Supreme

Court of Missouri, at October term, 1903, in the case of *Ford v. Kansas City*, 181 Mo. 137, at page 148-9, say:

“It may be conceded that the municipal corporation may impose upon municipal lotowners the burden of the duty of keeping the walks in front of their premises in reasonably safe repair, and enforce the same by special tax-bills, or penalties for failing to perform such duty; but we are unwilling to extend this power to a mere occupant of property to keep in repair the walks in front of the property occupied by him. This duty could only be enforced against a tenant by a judgment in the nature of a fine for failing to perform his duty; no tax-bill could be issued against him because he is not the owner of the property. The city has absolute control of its streets and sidewalks [and, it seems to this writer, practically over the abutting lots] and under the law it must keep them in a reasonably safe condition, and this duty cannot be evaded, suspended or shifted upon others by any act of its own. [*Welsh v. St. Louis*, 73 Mo. 71; *Russell v. Town of Columbia*, 74 Mo. 480.]

“The keeping of sidewalks in safe repair, in a large and populous city means in many instances, the doing of a large amount of substantial work, and if cities can impose this burden and duty upon mere renters of property, we confess those living in such cities, who are so unfortunate as not to be able to own the property occupied by them, are at the mercy of charter framers.

“It is unnecessary to express an opinion as to that part of the ordinance relating to the removal of snow and ice from the walks by the occupant, for that feature of the ordinance is not involved in this cause; but upon the question of imposing the duty of keeping the sidewalks in safe repair by the mere occupant, who is not the owner, we unhesitatingly say that *the charter*

provision and the ordinance predicated upon it, which authorizes the exercise of such power, is unconstitutional and void. We have searched in vain for authority which sanctions the exercise of any such power. We readily comprehend the reason for imposing the duty of street improvements and repair upon the property-owners, for such burdens of taxation are repaid in the enhancement of the value of the property, but no such reason can be assigned as to the tenants occupying the property."

Ford, the tenant, rented this property from J. B. Morrison. That leasehold was an interest in land. He was in possession and had the right to the possession and use of the property at the time the injury on the adjoining sidewalk occurred. This tenant had the exclusive right to the possession and use of the land and this right of way, the adjoining sidewalk. The owner of the remainder in fee could not, against the tenant's will, enter this property by this sidewalk without being liable as a trespasser. The property was as much his as though he had a deed to it in fee simple. The decision assumes that repairing this sidewalk was no benefit to the tenant who occupied the property and used the sidewalk. Of what value would this lease be; of what value would the fee simple be if the owner or tenant could not get to his property leased or owned in fee? If this sidewalk had been repaired, Mr. Ford would have suffered no injury. Is it possible that this was no benefit to Mr. Ford? Is it no benefit to Mr. Ford to have a right of way to and from his home free from danger to life and limb? Repairing this sidewalk according to this decision was no benefit to Mr. Ford, while a \$2,750 damage to Mrs. Smith's house and lot (128 Mo. 23) was a three-hundred-dollar benefit to her. If the city cannot impose this duty on the tenant who is actually benefited (would have been in this case)

ought a like duty to be imposed on a fee simple owner who is damaged?

The duty imposed on the party benefited is unconstitutional; the duty imposed on the party damaged is constitutional.

Suppose Mr. Ford had owned in fee this house and lot, would the city have been liable? If a sidewalk can be a special, peculiar, exceptive benefit to anyone, that person so benefited specially, peculiarly, exceptively is the one above all others on whom the burden should be cast. He who receives the benefit ought to bear the burden. Here was a loose plank in this sidewalk. It tripped Mr. Ford when his son stepped first on the loose plank. Repairing this loose plank would have saved Mr. Ford all this pain, anguish and misery. Less than two minutes would have nailed this plank so as to prevent this injury. Mr. Ford used the sidewalk daily. Why did he fail to discover the defect in this plank walk, which walk was a special, peculiar, exceptive benefit to him as occupant of the property, and the only person who had a special interest and benefit in it. It is said that the keeping of sidewalks in safe repair involves doing a large amount of substantial work. Nailing this plank down was a very small affair to the one who used it daily with full opportunity to know that the plank was loose and the walk was dangerous. The city must have better eyes for defects in sidewalks than the person who has a special property interest in it and who uses that property interest daily.

Owners in fee simple, however, are now at the mercy of charter framers. Their property may be made liable by special tax to the extent of one hundred per cent of the value of the land and one hundred per cent of all buildings thereon, to pay for a street improvement worth nothing to the landowner and even a damage to him. Gentle reader, don't you think we need a

change of constitutional law? This tenant leased this house and lot under a lease at will, or from month to month, or for years. A tenant for a term is bound to pay rent during his term, notwithstanding the destruction of the premises by wear or by fire or otherwise. His term in the house and lot burns up and he must pay the price for it just as though the price was for a fee simple in place of an estate at will or for years.

"The constitutional power to authorize the rendition of a personal judgment in such case was not considered or argued (in *St. Louis to use of McGrath v. Clemens*, 36 Mo. 467), and the same may be said as to the cases of the *City of St. Louis to use of Lohrum v. Coons*, 37 Mo. 44, and *Fowler v. City of St. Joseph*, 37 Mo. 228, and *The Inhabitants of Palmyra v. Morton*, 25 Mo. 593."

"In none of these cases, nor in any other case in this State to which we have been referred, was the constitutional power of the Legislature to authorize municipal corporations to make these local improvements and assess the cost against the adjoining property, and then recover a personal judgment against the owner of the property for the amount assessed, ever brought directly in question or discussed." [*City of St. Louis to use v. Allen*, 53 Mo. loc. cit. 51.]

"These special assessments are found in the English law, and have prevailed, it is believed, in most, if not all, of our American states, and their validity, when assessed as in this instance, cannot be questioned under our constitution." [*Lockwood v. St. Louis*, 24 Mo. loc. cit. 22.]

Continuing the court says: "Their intrinsic justice strikes every one."

When Mrs. Smith had to pay \$300 (67 Mo. App. 205) for damaging her property to the extent of \$2,750 (128 Mo. 23), in such cases, it ought not to be said of

such special taxes that "their intrinsic justice strikes every one." There is no intrinsic justice in a local tax of \$300 on local property for doing that local property a local damage of \$2,750, above all benefits conferred on it by the acts of the public. "Justice" is completely paralyzed.

In *Lockwood v. St. Louis*, 20 Mo. loc. cit. 23, the court, in speaking of exemptions from taxes and in distinguishing local from general taxes, say:

"The court held that this [exemption] referred to general taxes to be assessed for the benefit of the town, county or State at large; that to pay for the opening of a street, in proportion to the benefit derived from it, was no burden, and therefore no tax within the meaning of the law; and finally that the maxim, that he who feels the benefit ought to feel the burden also, was consistent with the interests and dictates of science and religion."

This sewer in St. Louis, the street grading in Kansas City (128 Mo. 23, and 67 Mo. App. 205), on Locust street and on May street (100 Mo. 300) were works which the cities could have been and were authorized to do and make payment therefor by the levy of general city taxes on all real and personal property in the cities doing the work and levying the tax. The sewer tax and the grading tax would then have been burdens on all St. Louis and Kansas City.

That burden, according to the later rules of constitutional law, ceases when the whole tax is placed on specified property, all other property being exempt from the tax, although sixty thousand times as much. Take Mrs. Smith's lot (128 Mo. 23): the tax was three hundred dollars. Counting the assessed value of all the property in Kansas City at \$45,000,000, Mrs. Smith's part of this \$300, special tax is one two-hundredth part of one cent, and this enormous tax of one two-hun-

dredth part of one cent is a burden too grievous to be borne, but this three hundred dollar special tax is not a burden even when the work to pay for which it was levied was a \$2,750 damage. Is this the meaning of the framers of the Constitution? Multiply this burdensome tax of one two-hundredth part of one cent by sixty thousand; it will then cease to be a burden even if levied to pay for doing the work occasioning a damage to the property fifty-five million times the amount of the general tax. In this stormy ocean, one ton weight is a burden sufficient to carry the taxpayer beneath the waves if tied around his neck; but put around him fifty-five million tons and he will swim with the greatest of ease.

When the courts so interpret the Constitution and the intention of the framers of the Constitution of Missouri of 1820, 1865 and 1875, we believe they commit a serious error. Such interpretation renders the titles to real estate insecure.

Williams v. Cammack, 27 Miss. 209, at 224, referred to in 25 Mo. 593, l. c. 595, bases the power on the theory that works of a public nature may be accomplished and a local tax be levied to pay for them even if the acts done are an injury to the property taxed.

“They [these acts] must be submitted to as the necessary action of the machinery of government and as individual sacrifices to the general good, in order that the advantages of the social compact may be enjoyed. This principle rests in the very foundations of society and is illustrated in every day’s experience of the citizen, yielding his natural rights, even of life, liberty or property, to the public good. But he can only claim immunity when it is secured to him by the principles of the Constitution.”

This decision was rendered in 1854. There is here nothing different from our own decisions in Missouri

(and elsewhere) in *St. Louis v. Peter Gurno*, 12 Mo. 414, and *Taylor v. St. Louis*, 14 Mo. 20.

The state government cannot *now*, in the exercise of any of its powers, damage private property for public use. There is *now* the same obligation to make "just compensation" for damaging as for taking. It is said, and with truth, that these taxes are found in the English law: "These special assessments are found in the English Law" (20 Mo. 22). It is true that these taxes exist and always have existed in England. In England, taxes are levied under an act of Parliament and this act of Parliament is always, in all cases, absolutely supreme. Parliament had the right to tax the American and all other colonies in all cases whatsoever. No such thing is known in English history as an act of Parliament being void on account of its conflict with the English Constitution. Acts of Congress and of the various state legislatures in the United States are different. We acquired Louisiana when the United States Constitution was only fourteen years old. That Constitution was only twenty-three years old when Missouri Territory was formed, and only thirty-two when Missouri was admitted as a State.

One Parliament cannot enact any law which a subsequent Parliament may not repeal. Congress cannot pass an irrepealable law. One state legislature cannot enact a law which a subsequent legislature may not repeal. Parliament consists of king, lords (temporal and spiritual) and commons. We have in the United States the President, the Senate, and House of Representatives. In each State we have the Governor, the Senate and House of Representatives. The English House of Lords has judicial powers. The Senate of the United States has not. No state Senate has any judicial powers except in a very limited way as in the New York senate.

Our Congress cannot change the Constitution of the United States. No state Legislature can change the state Constitution. Parliament can change the English Constitution. Acts of Parliament are omnipotent. Acts of our state Legislatures and of Congress are not omnipotent. The powers of government are here limited by our constitutions.

The legal force of a written constitution is well reasoned by Chief Justice John Marshall in *Marbury v. Madison*, 1 Cranch 68 to 72. This decision was rendered at the February term, 1803, of the Supreme Court of the United States, while the United States Constitution was only fourteen years old, and in the same year we purchased Louisiana. Say the court, page 68, bottom:

“The question whether an act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles supposed to have been long and well established, to decide it. That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent. This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

“The government of the United States is of the

latter description. The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the Legislature may alter the Constitution by an ordinary act. Between these alternatives, there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the Legislature shall please to alter it.

“If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the Legislature, repugnant to the Constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

“If an act of the Legislature, repugnant to the constitution, is void, does it notwithstanding its invalidity

bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was law? This would be to overthrow in fact what was established in theory; and would seem at first view an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the Constitution; if both the law and Constitution apply to a particular case, so that the courts must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution disregarding the law, the court must determine which of these conflicting rules governs the case.

“This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution; and the Constitution is superior to any ordinary act of the Legislature; the Constitution, and not such ordinary act, must govern the case to which they both apply.

“Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be

giving to the Legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure. That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution—would of itself be sufficient, in America where written constitutions have been viewed with so much reverence, for rejecting the construction.

“But the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection. The judicial power of the United States is extended to all cases arising under the Constitution. Could it be the intention of those who gave this power, to say that, in using it, the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained.

“In some cases, then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

“There are many other parts of the Constitution which serve to illustrate this subject. It is declared that ‘No tax or duty shall be laid on articles exported from any state.’ Suppose a duty on the export of cotton, of tobacco, or flour; and a suit instituted to recover it. Ought judgment to be rendered in such case? Ought the judges to close their eyes on the Constitution and only see the law? The Constitution declares that ‘No bill of attainder or ex post facto law shall be passed.’ If, however, such a bill should be passed and a person should be prosecuted under it, must the courts condemn to death those victims whom the Constitution

endeavors to preserve? 'No person,' says the Constitution, 'shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.' Here the language of the Constitution is addressed especially to the courts. It prescribes directly for them, a rule of evidence not to be departed from. If the Legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

"From these and many other selections which might be made, it is apparent, that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the Legislature. Why, otherwise, does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support. The oath of office, too, imposed by the Legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: 'I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States.' Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government? If it is closed upon him and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

"It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

"Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void, and that courts as well as other departments, are bound by that instrument."

There are many kinds of taxation enacted and enforced under the English Constitution which cannot be enforced in the United States: "No capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken." [Constitution of the United States, article 1, sec. 9.] Parliament always has levied such taxes. "No tax or duty shall be laid on articles exported from any State." [U. S. Const., art. 1, sec. 9.] Parliament always has levied such taxes. [See "Customs," in Blackstone's Commentaries (3 Ed.), by Cooley, vol. 1, book I, chap. 8, page (top) 312, (bottom paging) 195.]

These customs were not by common law for "Sir Edward Coke hath clearly shown that the king's first claim to them was by grant of Parliament (3 Edw. I), though the record thereof is not now extant." [Ib.]

Congress cannot enact an income tax law. Parliament can and has done so. Parliament may even change the succession. There is no such thing as an act of Parliament being against the English Constitution.

"The perpetual taxes are (Blackstone, vol. I, book I, chap. 8, page 312): the customs, or the duties, toll, tribute, or tariff, payable upon merchandise exported

and imported. The considerations upon which this revenue (or the more ancient part of it, which arose only from exports) was vested in the king, were said to be two (Dyer 165): first, because he gave the subject leave to depart the kingdom, and to carry his goods along with him; second, because the king was bound of common right to maintain and keep up the ports and havens, *and to protect merchants from pirates.*" In the United States we maintain and keep up ports and havens and protect our merchants from pirates, and yet we can not tax exports.

Sir William Blackstone (in his Commentaries, book I, vol. I, p. 159 top, 102 bottom, 3rd Ed. by Cooley) says:

"The power and jurisdiction of Parliament, says Sir Edward Coke (4 Inst. 36), is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court, he adds, it may be truly said '*Si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima.*' It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving *and expounding of laws*, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where *that absolute despotic power which must in all governments reside somewhere, is intrusted by the Constitution of these kingdoms. All mischiefs and grievances, operations and remedies that transcend the ordinary course of the laws are within the reach of this extraordinary tribunal.* It can regulate or new model the succession to the crown; as was done in the reign of Henry VIII. and William III. It can alter the established religions of the land; as was done in a variety of instances in the reigns of King Henry VIII. and his

three children. It can change and create afresh even the constitution of the kingdom and of Parliaments themselves; as was done by the act of the Union, and several statutes for triennial and septennial elections. It can in short, do every thing that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament."

The editor in a note says:

"By this is meant that Parliament is potent above all other powers in the realm, and whatever it shall assume to do no one else may question. It is not a law-making power merely, but may execute laws through its own agencies, and at its discretion may dispose of rights, and even take away life, as has often been done by means of bills of attainder."

The Supreme Court of the United States, in *Kilbourn v. Thompson*, 103 U. S. 168, et seq. (A. D. 1880), discuss the powers of Parliament under the English Constitution and the powers of legislatures under American Constitutions. Say the court, page 170:

"This is an action for false imprisonment brought by Hallett Kilbourn against John C. Thompson, Michael C. Kerr, John M. Glover, Jephtha D. New, Burwell P. Lewis and A. Herr Smith. The declaration charges that the defendants, with force and arms, took the plaintiff from his house and without any reasonable or probable cause, and against his will confined him in the common jail of the District of Columbia for the period of forty-five days."

Defendant Thompson made a special plea (set out at length) that he was sergeant at arms of the House of Representatives and confined Kilbourn in jail under the orders and judgment of the House of Representatives for contempt of the House. The plea of defendant Thompson set out in detail and with minuteness

the facts and circumstances leading up to the imprisonment of Mr. Kilbourn. He was a witness before a committee of the House and refused to answer certain questions. The United States was a creditor of Jay Cooke & Company who went into bankruptcy and certain settlements had been made. Fraud was charged and the committee were to inquire into the matter and report to the House. The committee summoned Mr. Kilbourn as a witness to bring before the committee certain books and accounts and papers. Mr. Kilbourn refused to bring the books, accounts and papers and refused to answer certain questions and he was committed for contempt. The court, after referring to the powers of the House of Commons say, page 183:

“It is important, however, to understand on what principle this power of the House of Commons rests, that we may see whether it is applicable to the two houses of Congress, and if it be, whether there are limitations to its exercise.

“While there is, in the adjudged cases in the English courts, little agreement of opinion as to the extent of this power and the liability of its exercise to be inquired into by the courts, there is no difference of opinion as to its origin. This goes back to the period when the bishops, the lords, and knights and burgesses met in one body, and were, when so assembled, called *the High Court of Parliament*. They were not only called so, but the assembled Parliament exercised the highest functions of a court of judicature, representing in that respect the judicial authority of the king in his court of Parliament. While this body enacted laws, it also rendered judgments in matters of private right, which, when approved by the king, were recognized as valid. Upon the separation of the Lords and Commons into two separate bodies, holding their sessions in different chambers, and hence called the House of Lords

and the House of Commons, the judicial function of reviewing by appeal the decisions of the courts of Westminster Hall passed to the House of Lords, where it has been exercised without dispute ever since. To the Commons was left the power of impeachment, and, perhaps, others of a judicial character, and jointly they exercised, until a very recent period, the power of passing bills of attainder for treason and other high crimes which are in their nature punishment for crime declared judicially by the High Court of Parliament of the Kingdom of England."

In *City of Kansas to use of Coates v. Ridenour*, 84 Mo. 253, at 261 (Oct. term, 1884), the Supreme Court of Missouri said:

"When sued on a special tax-bill, he (the property-owner) may attack the contract, set off against his liability damages from its negligent or imperfect performance or entirely defeat a recovery by overthrowing the theory of benefits conferred. [*Creamer v. Bates*, 49 Mo. 523; *Corrigan v. Gage*, 68 Mo. 541; *Halpin v. Campbell*, 71 Mo. 493.]"

Evidently the court had in mind the constitutional doctrines so often announced that even if there was a general benefit the tax was unconstitutional. "*When sued on a special tax-bill*," how is the property-owner to overthrow the theory of benefits?

In *Moberly v. Hogan*, 131 Mo. 19, at 22, bottom of page, the Supreme Court of Missouri say:

"At the trial the court refused to allow defendant's offer of testimony to show that the lot was not benefited, but that its value was destroyed thereby."

"The trial court committed no error in excluding defendant's evidence offered." [P. 24, top, same case.]

It is not competent to show in evidence that "the lot was not benefited." It is not competent to show that "its value was destroyed thereby." This lot could

not be taken for public use without just compensation. It could not be damaged for public use without just compensation, but in a case where "the lot was not benefited," in a case where "its value was destroyed," a special tax to pay the cost of doing that which was not a benefit to the lot; a special tax to pay the cost of doing that which destroyed its value, is a valid tax. The lot cannot be damaged for public use without just compensation, but its value may be destroyed and the lot may be made liable for the cost of such destruction, either total or partial.

In *Keith v. Bingham*, 100 Mo. 300, the Supreme Court of Missouri affirmed a judgment enforcing a tax-bill for grading a street in Kansas City, which grading damaged the lot. No damages were ever paid or offered to any one. If the city may make a contract to damage private property for public use without paying for it, why may not the city make a contract to take it without paying for it? In all cases the contractor is not the landowner; the landowner makes no contract.

"It may be observed, in the first place, that there is no attempt here to exercise the power of eminent domain for it was not proposed to condemn the defendant's property to public use, and it is unnecessary to discuss the character, extent or limitation of that power." [*Inhabitants of Palmyra v. Morton*, 25 Mo. 593, loc. cit. 595.]

The Constitution prohibits a name and not a thing. "Private property shall not be taken or damaged for public use without just compensation," now reads thus: "Private property shall not be condemned for public use or damaged by condemnation for public use without just compensation."

The present state of constitutional law in reference to what is called local taxation is this: The power

of the State to tax was unlimited. The Constitution of 1875 made no limit or restriction on local taxation. Prior to 1875 in Missouri, the legislative power was subject to one limitation on the tax power, and one alone—"property must be taxed according to value," but the tax might have been one hundred per cent of the value. Now the legislative power may authorize the construction of roads and streets, and may authorize them to be paved, graded and improved, and the cost thereof to be assessed to abutting land, even if the work done be a damage prohibited by the Constitution.

The legislative power in the State may tax occupations to the extent of one hundred per cent of the amount received by the employee. Taxation must be uniform throughout the territorial limits of the authority levying the tax, but this does not apply to local taxes. But if a lot is taxed according to frontage, then "each front foot thereof is assessed alike" (80 Mo. 391). A local tax that takes every thing owned by the taxpayer is certainly not lacking in uniformity. And if every person having an occupation were taxed one hundred per cent of his receipts, then every dollar he receives is taxed just like every other dollar he receives, and just like every dollar any other employee may receive.

The tax takes one hundred cents of each and every dollar he has. The local tax ought to be less than one hundred per cent. The legislative power ought not to be authorized to take the whole value of the property in the way of a local tax. A limitation to that effect should be put on that power.

It is now the constitutional law of the United States that local taxes may be levied on abutting property to pay for improving roads and streets to the extent of one hundred per cent of the value of the abutting land, although the abutting land may be damaged by the im-

provement for which the tax may be levied. The courts can afford no remedy.

What are the reasons which prevent judicial interference will now be inquired into.

CHAPTER 14.

REASONS WHICH PREVENT JUDICIAL INTERFERENCE.

By the Constitution of the United States, article 1, section 10, no State shall pass any law impairing the obligation of contracts. Nearly every state constitution contains the same or like provision. In the sense of the prohibition used in the Constitution of the United States it includes all laws. The ordinances of city councils, statutes enacted by the legislative power and state constitutions are all included. The prohibition is absolute and complete as to the whole State, and all the agencies through which the State may act.

The highest judicial tribunal of each state construes the Constitution and statutes of the State and the interpretation so placed on the Constitution and statutes becomes a part thereof the same as if copied into the statutes and Constitution.

In *Christie v. Pridgen*, 4 Wall. 196 (A. D. 1866), a statute of Mexico was involved. The statute was enacted before Texas was admitted as a State and the Supreme Court of Texas had construed this statute of Mexico. Say the court, page 203:

“The law of 1824, though general to the Republic of Mexico, was, so far as it affected lands within the limits of Texas, after the independence of that country, a local law of the new State—so much so as if it had originated in her legislation. It had at the time no operation in any portion of what then constituted the United States. The interpretation, therefore, placed upon it by the highest court of that State must, accord-

ing to the established principles of this court, be accepted as the true interpretation so far as it applies to titles to lands in that State, whatever may be our opinion of its original soundness. Nor does it matter that in the courts of other States, carved out of territory since acquired from Mexico, a different interpretation may have been adopted. If such be the case, the courts of the United States will, in conformity with the same principles, follow the different rulings so far as it affects titles in those States. *The interpretation within the jurisdiction of one State becomes a part of the law of that State as much so as if incorporated into the body of it by the Legislature.* If, therefore, different interpretations are given in different states to a similar local law, that law in effect becomes by the interpretations, so far as it is a rule for our action, a different law in one State from what it is in the other. 'That the statute laws of the states' says Mr. Justice Johnson, in delivering the opinion of this court in *Shelby v. Guy*, (11 Wheaton 367), 'must furnish the rules of decision of this court, so far as they comport with the Constitution of the United States, in all cases arising within the respective states,' is a position that no one doubts. Nor is it questionable that a fixed and received construction of their respective statute laws, in their own courts, *makes, in fact a part of the statute law of the country, however we may doubt the propriety of that construction.* It is obvious that this admission may at times involve us in seeming inconsistencies—as where states have adopted the same statute, and their courts differ in the construction. Yet that course is necessarily indicated by the duty imposed upon us, to administer, as between certain individuals, the laws of the respective states according to the best lights we possess of what those laws are."

Illinois and Missouri have a voluntary assignment

law couched in almost the same language. The Supreme Court of Missouri put a certain construction on her assignment law. Illinois put a different construction on her law. The Missouri statute is a different statute from the Illinois statute solely from the different interpretations put by the Supreme Court of each State on its own statute. [*Chicago Union Bank v. Kansas City Bank*, 136 U. S. 223, at 235; *White v. Cotzhausen*, 129 U. S. 329.]

The same principle will apply to constitutions. The interpretation put on the Constitution of a State by its highest judicial tribunal becomes a part of that Constitution the same as if copied into it.

The principle is well illustrated in *Township of Pine Grove v. Talcott*, 19 Wall. 666 (decided in the Supreme Court of the United States in October, 1873, under act of the Legislature of Michigan, approved March 22, 1869, under the Constitution of the State adopted in 1850). The Supreme Court of Michigan put a construction on her Constitution adopted in 1850. The Supreme Court of the United States *in this case* overruled that construction, holding that the Supreme Court of Michigan had erred in construing her state Constitution. The Constitution of the State of Michigan, adopted in 1850, contained this provision (art. 14, sec. 6): "The credit of the State shall not be granted to or in aid of any person, association or corporation."

The act of the Legislature of Michigan provided: "That it shall be lawful for any township or city to pledge its aid to any railroad company now chartered, organized, under and by virtue of the laws of the State of Michigan, in the construction of its road by loan or donation with or without conditions," etc. The aid was not to exceed ten per cent of the assessed valuation of the city or township and was to be authorized by popular vote. The Supreme Court of Michigan say:

“All these provisions were incorporated by the people in the Constitution as precautions against injudicious action by themselves, if in another time of inflation and excitement they should be tempted to incur the like burdensome taxation in order to accomplish public improvements, in cases where they were not content to wait the result of private enterprise. The people meant to erect such effectual barriers that if the temptation should return, the means of inflicting like injury upon credit, reputation, and prosperity of the State should not be within the reach of the authorities. They believed these clauses of the Constitution accomplished this purpose perfectly; and none of its provisions had more influence in recommending that instrument to the hearty good will of the people. In process of time, however, a majority in the Legislature were found willing, against the solemn warning of the executive, to resort again to the power of taxation in aid of internal improvement. It was discovered that though the State was expressly inhibited from giving such aid in any form, except in the disposition of grants made to it, the subdivisions of which the State was composed were not under the like ban. Decisions in other States were found which were supposed to sanction the doctrine that under such circumstances, the State might do indirectly, through its subdivisions, what directly it was forbidden to do. Thus a way was opened by which the whole purpose of the constitutional provisions quoted might be defeated. The State could not aid a private corporation with its credit, but it might require each of its townships, cities and villages to do so. The State could not load down its people with taxes for the construction of a public improvement, but it might compel the municipal authorities, which were its mere creatures and which held their whole authority and their whole life at its will, to enforce such taxes, one by one, until the whole people were bent to the burden.”

“Now, whatever might be the just and proper construction of similar provisions in the constitution of states whose history has not been the same with our own, the majority of this court thought, when the previous case was before us, and they still think, that these provisions in our Constitution do preclude the State from loaning the public credit to private corporations, and from imposing taxation upon its citizens, or any portion thereof, in aid of the construction of railroads. So the people supposed when the Constitution was adopted. Constitutions do not change with the varying tides of public opinion and desire; the will of the people therein recorded is the same inflexible law until changed by their own deliberate action; and it cannot be permissible to the courts that, in order to aid evasions and circumventions, they shall subject those instruments, which in the main only undertake to lay down broad general principles, to a literal and technical construction *as if they were great public enemies standing in the way of progress, and the duty of every good citizen was to get around their provisions whenever practicable, and give them a damaging thrust whenever convenient.* They must construe them as the people did in their adoption, if the means of arriving at that construction are within their power. In these cases we thought we could arrive at it from the public history of the times.” [*Bay City v. State Treasurer*, 23 Mich. 499, et seq., and *The People v. Salem*, 20 Mich. 452.]

This case in the Supreme Court of Michigan (20 Mich. supra) was heard in the Supreme Court of Michigan on April 7, 8, 12, 13, 14, 15 and May 24, 25, 1870, and decided May 26, 1870. The printed report occupies seventy-two pages. The special act of the Legislature was passed in 1864. The work was done on or about July 1, 1868. The suit was begun in July 1868,

This is not stated in terms in the reported case, but the work was done at that time which, by the contract, entitled the railroad to the delivery of the bonds, and railroads are never guilty of the least negligence in demanding municipal bonds. The case of the *People v. Salem* was mandamus to compel the city to issue and deliver the bonds. *Bay City v. State Treasurer*, 23 Mich., supra, was mandamus to compel the state treasurer to return bonds to Bay City, issued under act of March 22, 1869. The decision in the Supreme Court of Michigan was rendered at its October term 1871.

The question in *Township of Pine Grove v. Talcutt*, 19 Wall. 666, was one of power. Section 6 of article 14 of the Constitution of Michigan said: "The credit of the State shall not be granted to or in aid of any person, association or corporation." This was thought to be a restriction on the whole State, its Legislature, its governor and its courts. And the whole included all the parts and all parts of the State were limited and restrained by this provision. These decisions became a part of the Constitution of Michigan the same as if copied into it.

By the act of the Legislature of Michigan of March 22, 1869, it became lawful "For any township or city to pledge its aid to any railroad company, etc., to an amount not to exceed ten per cent of the assessed value of the property to be taxed."

In 1870 and 1871 the Supreme Court of Michigan decided that the state Constitution prohibited what was attempted under the act of the Legislature of Michigan of March 22, 1869, only one or two years before. The Supreme Court of the United States held that the Constitution of Michigan authorized what the Supreme Court of Michigan held that it prohibited. In *Township of Pine Grove v. Talcutt*, 19 Wall. 666, at 674, the court say:

“In 1863 began a series of special legislative acts authorizing the municipal subdivisions of the State named therein to give their aid respectively to the extent and in the manner prescribed. Between that time and the year 1869 thirty such statutes were enacted. In the latter year the general law was passed under which the bonds in question were issued. This summary shows the understanding in the Legislature and out of it, in the State, that there was no constitutional prohibition against such legislation. It does not appear that its validity was ever in any instance judicially denied until the year 1870.”

In the Constitution of the United States, article 1, section 10, we find this restriction: “No State shall pass any law impairing the obligation of contracts.” The *Township of Pine Grove v. Talcott* was decided in the United States Supreme Court in 1873, eighty-four years after the adoption of this provision in the Constitution of the United States. At page 677 the court say:

“It does not belong to courts to interpolate constitutional restrictions. Our duty is to apply the law, not to make it. All power may be abused where no safeguards are provided. The remedy in such cases lies with the people, and not with the judiciary.”

Now what remedy have the people? Here certain officers issued bonds. Judgment is rendered against the township. The contention was, the officers acted without authority. This is quite different from an abuse of authority. Officers cannot abuse an authority they do not have. The case is one of a want of authority—a failure to give authority or the exercise of an authority positively prohibited. Doing a thing prohibited is not an abuse of the prohibited power. It would not be an abuse of a non-existent power, much less

would it be an abuse of a prohibited power. Here the State prohibited the thing done. The state Constitution was so interpreted. What safeguard is it possible for the people of Michigan to make to remedy the thing done without authority?

Constitution of Michigan, article 14, section 6, says: "The credit of the State shall not be granted to or in aid of any person, association or corporation."

Constitution of Michigan, article 15 section 13, says: "The Legislature shall provide for the incorporation and organization of cities and villages, and shall restrict their powers of taxation, borrowing money, contracting debts, and loaning their credit." Why were "*cities*" and "*villages*" named and "*townships*" left out? Why were towns left out? "Cities" and "villages" have the powers of taxation, borrowing money, contracting debts and loaning their credit; otherwise, how can the Legislature restrict these powers or any other powers that do not exist.

"The language of this clause clearly implies that the powers to be restricted may be exercised and what is implied is as effectual as what is expressed." [S. C., 19 Wall. 1. c. 676.]

"What is implied in a statute, pleading, contract or will is as much a part of it as what is expressed. [2 Paines Rep. 251, *Koning v. Bayard*; 3 Wend. 258, *Haight v. Holley*; 10 Wend. 218, *Rogers v. Neeland*; 20 Wend. 447, *Fox v. Phelps*; Com. Dig., tit. "Devise," n. 12.]"

According to this reasoning, cities and villages have the following powers:

1. Power of taxation;
2. Power of borrowing money;
3. Power of contracting debts;
4. Power of loaning their credit.

These powers are granted by the Constitution of

Michigan and not by her Legislature. The argument is that the Constitution of Michigan gives her cities and villages the power of taxation and the other powers named. The Constitution of Michigan gives her cities power to tax property one hundred per cent, to tax occupations one hundred per cent, unless the Legislature restrict them. These cities can borrow all the coined money of the world unless the Legislature restrict them. Any one city in Michigan may loan its credit to the extent of ten times the national debt incurred in the war between the states in 1861-5, unless the Legislature restrict it. (Notwithstanding this language in the Constitution, the Supreme Court of Michigan held that there was no power in the Legislature to authorize the issue of bonds.)

In *Township of Pine Grove v. Talcott*, 19 Wall. at 677, the court say:

“The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of the States where the cases arise. It must hear and determine for itself. Here commercial securities are involved. When the bonds were issued, there had been no authoritative intimation from any quarter that such statutes were invalid. The Legislature affirmed their validity in every act by an implication equivalent in effect to an express declaration. And during the period covered by enactment, neither of the other departments of the government of the State lifted its voice against them. The acquiescence was universal.

“The general understanding of the legal profession throughout the country is believed to have been that they were valid. The national Constitution forbids the States to pass laws impairing the obligation of contracts. In cases properly brought before us, that end can be accomplished unwarrantably, no more by judicial decisions than by legislation. Were we to yield

in cases like this to the authority of decisions of the courts of the respective States we should abdicate the performance of one of the most important duties with which this tribunal is charged and disappoint the wise and salutary policy of the framers of the Constitution in providing for the creation of an independent Federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery."

The decision of the highest judicial tribunal in the State on the Constitution or statute law of the State becomes a part of such statute law or Constitution the same as if written into the Constitution or statute law. This was recognized in Missouri as the general rule of law in 1835, in the case of the *State of Missouri at the relation of Gentry et ux v. Frey et al.*, in 4 Mo. 120, et seq.

The relator, Gentry, sued on the bond made by defendants as principal and sureties on the guardian's bond as the guardian of Elvira Frey. Gentry stated that Elvira Frey had certain property and money in the hands and under the control of her guardian, Frey. After the guardian had had control of this property, Gentry married the ward and the property thus became his by the marriage, and the guardian refused to deliver or pay the money to Gentry, the husband.

The defendants set up a denial of the right of Gentry to the money and property of his wife in the hands of the guardian, for the reason that the bonds of matrimony between Gentry and wife had been dissolved by the Legislature of Missouri. Plaintiff demurred to this plea. The reader curious enough to read this divorce act will find it in Missouri Session Acts 1832-3, page 131. There and in contiguous pages the reader will find 47 divorces granted by the Missouri Legislature on three days in February 1833 (and not very good days for divorces either). One of these acts grants a

divorce, giving as a reason for it that under existing law the parties were not entitled to such divorce. It will be found on page 133, chapter 101.

In these cases the reader will notice that the Missouri Legislature claimed the omnipotence of the English Parliament, independent of and against the Constitution of Missouri. These chapters show something of the ideas and notions at that time, of the Legislature and its powers. The Legislature does all sorts of things. In chapter 97, page 129, the preamble recites that the wife abandoned the husband on their way up the Mississippi, at St. Louis. In chapter 98 the husband maltreats the wife and child, "and whereas the law of this State giving to the circuit court cognizance over such cases, does not cover the case of the said Sarah," etc., etc., "and consequently she has no redress but by and through the General Assembly," etc., therefore the Legislature gives them the divorce.

In chapter 101, the husband absents himself without cause, and the wife "commenced a suit for a divorce in the Third judicial circuit in this State and the judge of said circuit court dismissed said Mary Ann's petition on account of a technicality, and, whereas it is represented that the said Mary Ann is extremely poor and is but little able to pay the expenses of a second suit, for remedy whereof and because the General Assembly believes she is entitled to divorce from the bonds of matrimony by her contracted with said David," etc., therefore the Legislature grants the divorce.

Here our Missouri Parliament, "The High Court of Parliament," in effect grants a writ of error to the circuit court, our House of Commons, joining our House of Lords, but the governor, our king, dissented, but our "High Court of Parliament" nevertheless granted the divorce.

The preamble to chapter 102 finds "that said Eliza has always maintained an excellent reputation and given no cause for desertion by her husband; and, whereas, said Eliza has attempted to obtain her divorce at law and by the common course and practice of the court would have been entitled to her divorce in November last (i. e., 1832) had not continuance been given by the negligence of her counsel or the fault of the court, therefore the divorce is granted by the Legislature, also the sole custody of the child by said husband."

By chapter 105, Solomon and Susan were married in 1827 and in 1828 separated, then again came back and again separated; the last separation was under articles of separation which the husband supposed was a divorce, and on that supposition had married Elizabeth, and at the January term, 1832, the wife filed her petition for a divorce thereby showing she desired to be relieved from her bonds of matrimony; and the husband having married Elizabeth, upon the supposition that the articles of separation were a divorce, therefore the divorce is granted. The legislative act seems to be in the nature of a specific execution in equity of what one party supposed was the effect of the articles of separation. This was the decree of our Missouri House of Lords, the House of Commons assenting thereto, and the divorce was granted although the king dissented. Our Missouri Parliament divorced in this way, our Henry VIII. from Catherine of Aragon. Everybody is a sovereign here without any constitutional restraints.

By chapter 107, Francis and Martha had been married and each had sued for divorce, but both petitions had been dismissed for failure to give security for costs; therefore, the Legislature divorced them.

These are special acts for individual cases—a sort

of retail divorce; but the Legislature did a wholesale business in chapter 99, consisting of thirty-nine sections, each section being a divorce of a pair unhappily mated according to the legislative determination.

State of Missouri ex rel. Gentry et ux v. Frey et al., 4 Mo. 120, et seq., was decided in the Supreme Court of Missouri at its August term, 1835, reported in 1837. Elvira Frey, a minor, was owner of certain property then in guardian's hands and control. While yet a minor she was married to Gentry; then came the legislative divorce in 1833. Gentry, after the legislative divorce, brought suit on the guardian's bond against the guardian and sureties on the guardian's bond. The sureties set up the legislative divorce as a divestiture of title from Gentry, the husband, to the property of the wife in the guardian's hands. To this plea in bar there was a demurrer founded on the invalidity of the legislative divorce. The Supreme Court of Missouri held the act unconstitutional on three grounds:

1. The act was retrospective in its operation. [This would have been no objection under the English Constitution; it was no objection under the Constitution of the United States.]

2. It was judicial action on the part of the Legislature, forbidden by article 2 of the state Constitution. [The powers of government shall be divided into three distinct departments, each of which shall be confided to a separate magistracy; and no person charged with the execution of powers properly belonging to one of these departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.]

3. The legislative act impaired the obligation of the contract (marriage) between Gentry and wife by which contract he became entitled to her property.

At page 183 the court say :

“This contract must be within the prohibition, unless there is something in the nature of the subject which would in equity and in the nature of the thing, take it out of the provision. In this case no such equity nor necessity has been shown, nor is it believed that any exist. If it is constitutionally true that no law can be passed to impair the obligation of a contract to pay money, to build a house, or dig a ditch, why ought it to be less true that a law can not be passed to deprive a person, against his consent, of the rights accruing to him by the contract of marriage. If A. promise to build a house for B. and fail to do it, can the Legislature of the State say he is not bound to build the house nor pay damages for the failure? If they can not do this, how does it happen they can, upon any principles known to reason and sound logic, declare that the wife, who was B.’s, shall no longer be his, and that the parties are henceforth discharged from all obligations towards each other, to fulfill the duties by them contracted to be fulfilled. An answer is attempted to be given to this proposition which I think is no just answer. It is this, that marriage is a contract of a character highly municipal, and that society cannot exist without a power somewhere in a State to divorce married persons. It is agreed that marriage is highly municipal in its character! that is, the law of the land must declare who can and who can not marry; it must define what words, ceremonies and forms are requisite to form the contract; it must declare the rights and duties of the parties, and lastly, it must declare what shall be the consequences to the parties, in case of a failure to comply with the contract. It is also agreed that in every well-governed State, there should be a power to divorce, or rather to release the injured party from the other who has broken his contract. But to release the injured

party from farther performance, where there has been a breach of the agreement by the other, is not in any reasonable view of the subject, impairing the obligation of the contract; but is rather providing a remedy by which some compensation is made for the failure to obey the obligation of the agreement.

“But again, this answer goes too far. Is it not equally true, that every contract is also highly municipal? Must not the law of the land declare who can make a contract to dig a well, and what rights the parties shall, respectively, have in case this contract is fulfilled or broken? In the one case the operator has a right, when he complies with his agreement, to have a compensation. In the other, the owner has the right to the use of the well, and in case of a failure by either, the other has a right to insist on a compensation for the failure. Now, all contracts are matters of municipal regulation, and the Constitution certainly did intend to prevent the law-making power from enlarging or lessening the terms and benefits the citizens might at any time secure to themselves by contracts which were lawful at the time they were made.

“In the case before the court I think it has been shown that by this marriage, the wife contracted and gave to the husband her person and fortune, subject to the action of the law of the land as it then stood. It is a fixed rule in law, that the law relating to a contract is as much a part of the agreement, as if it were expressed by the parties. If this is true, then the contract was that the husband shall have all the personal property of the wife, both in possession and in action, subject to this condition, that, as to that portion of the personalty not reduced to possession during coverture, it should go to the personal representatives of the wife or to herself in case she survived her husband, and that as to the real estate of the wife, the husband

should be tenant for life of them in case issue capable of inheriting to the wife, is born alive. Are these advantages and benefits not worth securing to the citizens by constitutional guaranty, as much as any others that relate to property?"

Here we have in Missouri more cases of legislative divorces than Michigan had in reference to railroad aid bonds. The understanding in the Missouri Legislature and out of it seems to have been on a parallel with that of Michigan on railroad aid bonds, and the Missouri Supreme Court seem to have held that legislative divorces were prohibited by the Missouri Constitution just as the Michigan Supreme Court held her railroad aid bonds prohibited by the Michigan Constitution. Neither the Supreme Court of Michigan nor that of Missouri seem to have been controlled by street rumors. The opinion in Missouri in the Legislature and at the Bar and in the community is similar to that alleged to exist in Michigan when the bond cases were decided.

State ex rel. Gentry v. Frey et al., has never been overruled in Missouri. As will be seen, various attempts were made by the Legislature to grant divorces in Missouri.

While our Supreme Court in Missouri has never overruled this case, the Legislature paid no attention or at least little attention to the ruling of the court. Two legislative divorces were granted in 1837 (Session Acts 1836-7, pages 311-2); one in 1839 (Session Acts 1838-9, page 214); two in 1841 (Session Acts 1840-1, page 176); six in 1843 (but these refer the parties to the courts to get divorces, specially in those cases created by legislative act), see Session Acts Missouri Legislature 1842-3, pages 203-5; Session Acts 1844-5 pages 83-85. The reader will here find the Bryson divorce on page 85; in Session Acts 1848-49, pages 451-

464, fifty-three divorces were granted in a few days in February and March, 1849, nearly fourteen years after such legislative divorces were held unconstitutional by the Supreme Court at the August term, 1835, in *State ex rel. Gentry et ux v. Frey et al.*, in 4 Mo. 120. This was twelve years after the report (4 Mo.) was published.

Revised Statutes of Missouri A. D. 1835, page 401, section 1, is thus: "Marriage is considered in law as a civil contract, to which the consent of the parties capable in law of contracting is essential." I can not find this language in any previous Session Act. This law has been continued thus in Revised Statutes 1845, page 729, section 1; Revised Statutes 1855, page 1061, section 1; General Statutes 1865, section 1, page 458; Revised Statutes 1879, section 3264, vol. 1, page 553; Revised Statutes 1889, vol. 2, page 1604, section 6840; Revised Statutes 1899, page 1035, section 4311.

In *Bryson v. Rosanna Campbell*, 12 Mo. 498-9 (Oct. 1849), Bryson had been divorced by special act of the Legislature in February, 1845 (Session Acts 1844-5, page 85). His wife, after the divorce, boarded with Rosanna Campbell. The husband refused to pay his wife's boardbill. The plea was that she was not his wife because the Legislature had divorced them and he was not bound to pay it. That was one of the bonds of matrimony from which he was released. Rosanna Campbell had judgment and the cause was removed on error to the Supreme Court, where the judgment below was affirmed.

The court refused to depart from the authority of *State ex rel. Gentry et ux v. Frey et al.*, 4 Mo. 120, et seq. In the brief for plaintiff in error, counsel say, p. 498:

"The counsel for appellant never having seen the propriety of the decision in the case of *State v. Frey*, but being well satisfied of the legislative power to

grant divorces, and believing that the doctrine laid down in that case is not satisfactory to the Bar generally, respectfully solicit a review of the grounds on which it was decided."

This decision was rendered in October, 1849, after Revised Statutes 1835 went into effect, whereby it was enacted that "marriage is a civil contract." Mr. Bryson was by the marriage (this civil contract) bound to board his wife. The Legislature could not relieve Mr. Bryson from that obligation of the marriage, this civil contract and the act of the Legislature was held void as impairing the obligation of that contract.

The question came up again in 1853 in *Bryson v. Bryson*, 17 Mo. 590. The case was a proceeding to obtain alimony from the husband because the husband had abandoned the wife without cause, and had refused to maintain and provide for her. The defendant Bryson set up the legislative divorce as a release and discharge. The legislative divorce was held unconstitutional and the judgment for alimony was affirmed. The court say:

"The question is again presented, no doubt, with the hope that in a change of the judges there may be a change in the views of the court," p. 591. The case is put mostly on the ground that divorce is a judicial act beyond the powers of the Legislature, but it is also held that such legislative act impairs the obligation of the contract.

"Those who had not legal cause for seeking a divorce or were in too great haste to wait to the end of regular judicial proceedings and have therefore resorted to the Legislature to obtain releases from their bonds of matrimony, must be content to take the acts they have obtained without expecting courts to maintain their validity against the Constitution of the State." [17 Mo. 595.]

The Bryson case again came up in 1869 in *Bryson by next friend v. Bryson*, 44 Mo. 232, et seq., at the March term, 1869. The Missouri Constitution of 1865, article 4, section 27, contained this language: "The General Assembly shall not pass special laws divorcing any named parties;" the last Bryson case above was a suit to increase alimony and the defendant again set up the legislative divorce and again it was held unconstitutional.

The constitutional question was again in question in *Richeson v. Simmons*, 47 Mo. 20, decided in 1870, under a divorce granted by the Legislature March 2, 1849. Here the wife deeded land without her husband joining her (who had been divorced by special act of the Legislature). The husband was considered to have deserted his wife and to have been, as it were, "beyond seas" under general common law, and hence she had all the powers of a *femme sole* under general common law and could convey her real estate. By his conduct the husband could make no claim to the land. He was estopped. Divorce by act of the Legislature is unconstitutional as impairing the obligation of contracts. The husband by the contract of marriage was entitled to the possession and use of the wife's land. He had that right notwithstanding the legislative divorce; otherwise there is nothing to be estopped from; there is nothing for the estoppel "to feed on."

The case admits that the legislative divorce impairs the obligation of the contract, but the one party to the contract whose contract rights are violated is estopped to claim his rights under that contract as he might be estopped from claiming contract rights under any other contract. The land was virtually the separate property of the wife and she might convey it whether divorced or not.

David S. Maynard and Lydia A. Maynard were

married in 1828 in Vermont. They went to Ohio in 1850. During that year the husband went to Oregon and in September of that year took up his residence there and lived there till his death in 1873. Lydia A. Maynard died in Ohio in 1879. Henry C. Maynard and Mrs. Frances J. Patterson are the children of that marriage and are the plaintiffs in the case of *Maynard v. Hill*, 125 U. S. 190, et seq.

In April, 1852, Maynard settled upon a tract of 640 acres in Oregon, as a married man, claiming the right to obtain the title to the 640 acres under the act of Congress, United States statutes at Large, vol. 9, 496, chap. 76. [See sec. 4.] On December 22, 1852, the legislative assembly of Oregon divorced Maynard and his wife. On January 15, 1853, twenty-four days after the legislative divorce Maynard, the divorced husband, married Catherine T. Brashears and thereafter they lived together as husband and wife, till his death in 1873. Maynard lived on, cultivated and improved the land from April 3, 1852, to April 3, 1856, the required four years, and on April 30, 1856, applied for a certificate for a donation claim for the 640 acres, entitling him and his second wife to a patent for the land. The officers in charge of the land office at first granted the certificate, the west 320 acres to the husband and the east 320 acres to the second wife. This certificate was annulled by the commissioner of the general land office on the ground that Lydia A. Maynard, the first wife, was supposed to be dead and her heirs were therefore entitled to the land. On a subsequent hearing before the register and receiver, the first wife appeared and those officers awarded the land to her (east 320 acres) and the west 320 acres to the husband. The case was appealed to the commissioner of the general land office. He affirmed the decision giving the west 320 acres to the husband, but reversed the holding giving the east

half to the first wife. The second wife was not entitled to anything, although she lived on the land, because she was not his wife in 1850, or within a year thereafter, as provided by the act of Congress. Under this act of Congress the title was to go directly to the wife, and not to the wife through the husband. The executive officers of the United States held that the land still belonged to the United States and that neither the *de facto* wife nor the *de jure* wife had any vested interest. Neither wife had any contract with the United States. This was the decision of the land officers. The land being subject to sale was sold to defendants Hill and Lewis, and patent issued accordingly, and this was a suit in equity to divest their title and vest it in plaintiffs, children of the first wife, the bill seeking to hold defendants as trustees *in invitum*, as they were charged to have bought with full notice. The case went from the Supreme Court of Oregon Territory to the Supreme Court of the United States. At last the *de jure* wife's claims were held invalid.

Section 9, article 1, Constitution of the United States, says: "No bill of attainder or ex post facto law shall be passed." A law impairing the obligation of contracts is not forbidden.

Section 10, Constitution of the United States says: "No State shall pass any bill of attainder, ex post facto law or law impairing the obligation of contracts."

The States are prohibited from passing laws impairing the obligation of contracts; the United States are not. Neither are the United States territories. Congress may pass a law impairing the obligation of contracts or Congress may authorize the territorial legislatures to do so. When Oregon adopted her state Constitution in November, 1857, legislative divorces were prohibited under article 4, section 23, subdivision 5.

"If the act declaring the divorce should attempt

to interfere with rights of property vested in either party, a different question would arise." [Opinion of the court in *Maynard v. Hill*, 125 U. S. 190, l. c. 206, near top.]

Under the general common law, all the personal property of the wife becomes the property of the husband immediately on the marriage. What becomes of it under a legislative divorce? The opinion seems to intimate it will remain with the husband. On marriage and birth of issue, the husband has his curtesy. Will a legislative divorce divest the husband of that interest? Congress may pass a retrospective law. Congress may pass a law impairing the obligation of contracts. Congress could have passed the divorce act enacted by the Legislature of Oregon Territory, itself the creature of Congress. Congress could have confirmed it or rejected it. Congress could act on the subject. Its action is not rendered void by the Constitution of the United States because it is retrospective or impairs the obligation of contracts or divests vested rights.

In the matter of legal obligation the bonds of matrimony ought to be on a par, at least, with municipal bonds and contracts to dig wells or make sewers.

In all cases in which special tax-bills have been issued to pay for public improvements there has been a contract to do the work and that contract imposes certain obligations on the contracting parties. After these public improvements have been made under contracts duly authorized by law, then the legislative power of the State cannot impair in any degree the obligation of the contract. That obligation cannot be impaired in any degree on the part of either party to the contract without the consent of the other. The Constitution of the State and the laws of the State are interpreted by the highest judicial tribunal in the State, and it frequently happens that constitutions and statutes are judicially overthrown and perverted.

The language of the Constitution of the United States is that "No State shall pass any law impairing the obligation of contracts." The law controlling municipal bonds and that controlling special taxes and tax-bills are the same. There were certain statutes enacted in the various States of the Union authorizing public improvements in the several States. Here is the origin of the state bond and municipal bond and the special tax-bill. Both involve the power of taxation. Both involve contracts. Both result in money obligations, and for raising the required money, taxes are imposed on the citizens in both cases alike.

In case the Legislature of the State enact laws authorizing the issue of bonds, and then after the bonds are issued and sold on the market and money realized thereon, as evidently intended, the Legislature cannot then enact another law defeating the payment in part or in whole of such bonds issued and delivered and unpaid. The state Legislature in like manner can make laws authorizing contracts for public improvements to be paid in special taxes or tax-bills. After the contracts are made and executed the Legislature cannot enact laws under which the contract shall be held invalid. The State cannot "Pass a law impairing the obligation of contracts." But what is it for a State to "Pass a law impairing the obligation of contracts?" Questions of power or authority come before the courts on bonds. The courts hold that the bonds are issued by authority. Then persons relying on the decisions of the courts as being a part of the law and Constitution so construed, the same as if copied into them, buy the bonds on the faith of such decision and after they have so bought, relying on such bonds and the decision of the courts that they are issued by authority—if then the courts change their decision and hold that the bonds are is-

sued without authority, the last decisions overruling the first decisions becomes a part of the Constitution and statute the same as if copied into them. The last decision is contradictory to the first decision. Did the State by such decision of its courts "Pass a law impairing the obligation of contracts?"

At first glance it would appear that the State did not pass any law at all. But on further reflection this section of the Constitution of the United States ought to be regarded as a statute highly remedial in its character and ought to be so construed as to advance the remedy and suppress the mischief.

A statute is enacted and the courts hold it constitutional and valid; then after contracts are made under it and on the faith of the decisions supporting its validity the law is repealed—so repealed in terms as to nullify contracts made under it—the repealing statute cannot thus impair the obligation of contracts.

A like statute is enacted for public improvements and municipal bonds or special taxes or special tax-bills. Public improvements are made; tax-bills issued; suits thereon are brought in the courts resulting in a decision of the highest judicial tribunal in the State holding the tax-bills valid as having been issued by authority of a constitutional law. Another public improvement is ordained to be made and the work is let by contract to the lowest bidder. The work is done. The work is done as required by contract and ordinance, and suit is brought to enforce the contract or on tax-bills issued for the work. The Supreme Court held former tax-bills and a former contract valid as having been made by authority of law. That decision is now overruled and the contract and tax-bills in suit are held invalid as made and issued without authority of law.

Although this result is attained apparently by judicial decision, it is just as ruinous as if accomplished

by legislative act. In each case the contractor's loss is precisely the same. In one case he relied on the legislative act and lost, and in the other he relied on the judicial decision as being the law and lost. Here is a change in the law. It is wholly immaterial whether that change in the law is effected by the Legislature or the courts. The State, through her courts, has passed a law impairing the obligation of contracts.

Speaking of this judicial legislation, the Supreme Court of the United States, in *Ohio Life Insurance and Trust Company v. DeBolt*, 16 Howard 1. c. 432 (a writ of error to the Supreme Court of the State of Ohio), say:

"Indeed, the duty imposed upon this court to enforce contracts honestly and legally made, would be vain and nugatory, if we were bound to those changes in judicial decisions which the lapse of time, and change in judicial officers, will often produce. The writ of error to the state court would be no protection to a contract, if we were bound to follow the judgment which the state court had given, and which the writ of error brings up for revision here. And the sound and true rule is that if the contract when made was valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the Legislature of the State *or decision of its courts, altering the construction of the law.*" (This decision was rendered in 1853.)

The above language is quoted with approval in *Gelpcke v. Dubuque*, 1 Wall. 175, at 206 (decided in 1863), where the court adds:

"The same principle applies where there is a change of judicial decision as to the constitutional power of the Legislature to enact the law. *To this rule*

thus enlarged we adhere; it is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal."

In *Havemeyer v. Iowa County*, 3 Wall. 294, 1. c. 303, the court say:

"The subsequent adjudications in *The State v. Leon*, decided in 1859, and the cases which followed it hold that such statutes are 'of a general nature' and have no validity until published. But being long posterior to the time when the securities were issued, they can have no effect upon our decision and may be laid out of view. We can look only to the condition of things which subsisted when they were sold. That brings them within the rule laid down by this court, in *Gelpcke v. Dubuque*. In that case it was held, that if the contract when made, was valid by the Constitution and laws of the State, as then expounded by the highest authorities whose duty it was to administer them, no subsequent action by the Legislature or judiciary can impair its obligation. *This rule was established upon the most careful consideration. We think it rests upon a solid foundation, and we feel no disposition to depart from it.*"

There is some difficulty in reconciling the decisions on the question of the constitutional powers of the States. The highest judicial tribunal in the State determines the constitutional (State) and statute law of the State. Municipal corporations are the creatures of the State and a part of the state government. The state Constitution determines the powers given to the different departments of the state government. The state Supreme Court determines the constitutional powers of all the departments of the state government, and its decision is final and becomes a part of the state Constitution the same as if copied into it. One legislature

can not by statute law bind their successors and one set of judges can not by any decision bind their successors. Otherwise we should have no overruled cases.

In *Central Land Company v. Laidley*, 159 U. S. 103, et seq. (A. D. 1895), the court discuss this constitutional question. It is the legislative powers of the courts. The question came up on the construction of a state statute in reference to the statute powers of married women to make deeds of their lands.

The state Supreme Court had held such deeds valid under the statute, and thereupon after such decisions were rendered and on the faith of such decisions as to the powers conferred by such statute, deeds were taken for land purchased and paid for and these deeds so taken were brought into controversy again and the first decisions were overruled and decision made that the deeds were without authority. Did this last decision impair the obligation of the contract (the warranty deed of the married woman)? Perhaps this is not a correct statement of the real matter in controversy and the real wrong done.

It was the Virginia statute that impaired the obligation of the contract, not the court's decision as to what is the statute. It was the statute that was contrary to the Constitution of the United States not the decision of the court, for that only determined what was the statute.

We have in 1820 a statute in Virginia authorizing deeds by married women. Subsequently we have no such statute and never had it in 1820 or at any other time. These are legislative acts, so the courts decide, but the courts do not make the statute laws. They only interpret them.

If the Virginia Legislature had enacted two different laws, one declaring that the law authorized married women to convey their land at and after 1820 and after

deeds had been made under it, then in 1865 another act should be passed that in 1820 and afterwards married women had no such authority, then we have an exact parallel. The last legislative act (retrospective in character) impaired the obligation of contracts made prior to its passage. These were the acts of the Virginia Legislature.

The Virginia court was bound to decide what was the statute law of West Virginia, and when the highest judicial tribunal in the State determines what was the statute law of that State that decision was conclusive. No power on earth can declare that is not the statute law of Virginia.

The assignment of errors presents the point thus, page 107:

"1. That the purchase of the said land of the said Pennybackers, and the said deed conveying the same, became an executed contract, which no action of the judiciary of the State of West Virginia had any right, authority or power to impair or invalidate by changing the settled construction of said section 4 of chapter 73 of the Code of West Virginia of 1868."

"2. That under and by virtue of section 10 article 1 of the Constitution of the United States, no State is permitted to pass any law impairing the obligation of contracts; that the statutory construction of the law of West Virginia, as it existed when the contract was made, governed the rights of the parties, and rights vested under such existing constructions of the then laws cannot be divested, under said clause of the Constitution of the United States, by a subsequent decision of the state courts holding contracts invalid that were valid when made; such decisions of the state courts are contrary to the Constitution of the United States."

"3. Because there appears on the record of said cause a Federal question in this; that the courts of

West Virginia, in construing the said statute relating to deeds and acknowledgments thereof so as to invalidate the said deed to C. P. Huntington, under which your petitioner claims, changed, without legislative action, the settled and established construction which existed at the time of the execution and delivery of said deed, which is contrary to the Constitution of the United States; and there is a Federal question raised by said record in this; that the said decision of the circuit court of Cabell county, which undertakes to deprive your petitioner of his property is without due process of law, retroactive in its effect, and unconstitutional." This was a writ of error to the Supreme Court of West Virginia. The court say, page 109:

"The grounds relied on for invoking the appellate jurisdiction of this court are, in substance, that by the decision of the Supreme Court of Appeals of West Virginia, *without any legislative action*, the obligation of the contract contained in the deed from Mr. and Mrs. Pennybacker to Huntington, the grantor of the plaintiff in error, has been impaired, and the plaintiff in error has been deprived of its property without due process of law."

"Assuming without deciding, that these grounds were sufficiently and seasonably taken in the courts of West Virginia, we are of the opinion that they present no Federal question. In order to come within the provision of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been State, and not by a decision of its judicial department impaired by some act of the legislative power of the *only*.

"The appellate jurisdiction of this court, upon

writ of error to a court on the ground that the obligation of the contract has been impaired, can be invoked only when an act of the Legislature, alleged to be repugnant to the Constitution of the United States, has been decided by the state court to be valid, and not when an act admitted to be valid has been misconstrued by the court. The statute of West Virginia is admitted to have been valid, whether it did or did not apply to the deed in question; and it necessarily follows that the question submitted to and decided by the state court was one of construction only and not of validity. If this court were to assume jurisdiction of this case, the question submitted for its decision would be, not whether the statute was repugnant to the Constitution of the United States, but whether the highest court of the State has erred in its construction of the statute.

“As was said by this court, speaking by Mr. Justice Grier, in such a case, as long ago as 1847: ‘It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this court to review their decisions or assume jurisdiction over them on the pretense that their judgments have impaired the obligations of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary.’ [*Commercial Bank v. Buckingham*, 5 How. 317, 343; *Lawler v. Walker*, 14 How. 149, 154.]

“It was said by Mr. Justice Miller, in delivering a later judgment of this court: ‘We are not authorized by the judiciary act to review the judgments of the state courts, because their judgments refuse to give effect to valid contracts or because those judgments, in their effects, impair the obligation of contracts. If we did, every case decided in a state court could be

brought here, where the party setting up a contract alleged that the court had taken a different view of its obligations to that which he held.' [*Knox v. Exchange Bank*, 12 Wall. 379, 383.]

"The same doctrine was stated by Mr. Justice Harlan, speaking for this court, as follows: 'The state court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void which, in our opinion, is valid, or its interpretation of the contract may, in our opinion, be radically wrong; but, in neither of such cases, would the judgment be reviewable by this court under the clause of the Constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment in terms or by its necessary operation gives effect to some provision of the state Constitution, or some legislative enactment of the State, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question.' [*Lehigh Water Co. v. Easton*, 121 U. S. 388, 392.]"

Other cases are cited without comment. The court continuing say:

"The decisions cited by plaintiff in error to support the jurisdiction of this court in the case at bar were either cases in which the writ of error was upon a judgment of a state court which gave effect to a statute alleged to impair the obligation of a contract made before any such statute existed, as in *Louisiana v. Pilsbury*, 105 U. S. 278; *Chicago Ins. Co. v. Needles*, 113 U. S. 574, and in *Mobile and Ohio Railroad v. Tennessee*, 153 U. S. 486; or else the writ of error was to a circuit court of the United States bringing to this court the whole case, including the question how far the courts of the United States should follow the de-

cisions of the highest court of the State, as in *Gelpcke v. Dubuque*, 1 Wall. 175, 205; *Olcott v. Supervisors*, 16 Wall. 678, 690; *Douglass v. Pike County*, 101 U. S. 677, 686; *Anderson v. Santa Anna*, 116 U. S. 356, 361; and other cases cited in *Louisiana v. Pilsbury*, 105 U. S. 278, 295.

“The distinction as to the authority of this court, between writs of error to a court of the United States and writs of error to the highest court of a State, is well illustrated by two of the earliest cases relating to municipal bonds, in both of which the opinion was delivered by Mr. Justice Swayne, and in each of which the question presented was whether the Constitution of Iowa permitted the Legislature to authorize municipal corporations to issue bonds in aid of the construction of a railroad. The Supreme Court of the State, by decisions made before the bonds in question were issued, had held that it did; but by decisions made after they had been issued, held that it did not. A judgment of the District Court of the United States for the District of Iowa, following the later decisions of the state court, was reviewed on the merits, and reversed by this court, for misconstruction of the Constitution of Iowa. [*Gelpcke v. Dubuque*, 1 Wall. 175, 206.] But a writ of error to review one of those decisions of the Supreme Court of Iowa was dismissed for want of jurisdiction, because, admitting the Constitution of the State to be a law of the State, within the meaning of the provision of the Constitution of the United States forbidding a State to pass any law impairing the obligation of contracts, the only question was of its construction by the state court. [*Railroad Co. v. McClure*, 10 Wall. 511, 515.]

“When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful

party of his property without due process of law, within the fourteenth amendment of the Constitution of the United States. [*Walker v. Sauvinet*, 92 U. S. 90; *Head v. Amoskeag Co.*, 113 U. S. 9, 26; *Marley v. Lake Shore Railroad*, 146 U. S. 162, 171; *Bergman v. Backer*, 157 U. S. 655.]”

The case was dismissed for want of jurisdiction.

On well-settled principles of general law, the Supreme Court of the United States cannot reverse the judgment of any state Supreme Court unless that judgment is erroneous, and if it is erroneous then the Supreme Court of the United States has no jurisdiction.

The Supreme Court of Iowa, by a series of decisions, held that municipal railroad aid bonds were authorized by the state Constitution. Then the question again came up in the Supreme Court of Iowa and that court by a series of decisions held these municipal bonds were without authority in the Constitution of the State. Then the Circuit Court of the United States for the district of Iowa followed the construction of the Iowa Constitution placed on it by the Supreme Court of Iowa, and rendered its decision that these Iowa bonds were without constitutional authority. But on hearing the case on error in the Supreme Court of the United States, that judgment was reversed because it was not erroneous. The case was remanded to the United States District Court so that that court could enter a judgment that was erroneous in lieu of the one reversed which was not erroneous. What the state court decides, is erroneous in United States courts; and what United States courts decide, is erroneous in the state courts.

If the Supreme Court of the United States may disregard the decisions of the highest judicial tribunal in the State on the question of the constitutional power of the State Legislature to enact laws in reference to railroad aid bonds, because commercial securities are

involved, then they may sweep away the parts of the Constitution prohibiting the making of commercial securities. The State cannot in this way interfere with commerce.

The decisions of the Supreme Court of Iowa and that of the Supreme Court of the United States, although they seemingly conflict with each other, are both right. In *Railroad Co. v. McClure*, 10 Wall. 511, 515, the State of Iowa had adopted a certain Constitution. Municipal corporations apparently had the power (from the language used) to issue railroad aid bonds. Such bonds were issued. Various persons bought the bonds paying therefor their full value, relying on the language and meaning of the Constitution. After the bonds were issued and sold on the market their validity was denied by the municipal corporations issuing them. The corporations claimed that there was no constitutional authority to authorize their issue. Suit was brought on some of these bonds; the answer set up that the bonds were without authority of law; that they were prohibited by the state Constitution. The case went to the Supreme Court of the State. That court held that the acts of the Legislature of Iowa, authorizing the issue of the bonds, were not in conflict with the Constitution of the State of Iowa; and the statute was valid and the bonds were issued by authority of law.

The Supreme Court of Iowa, in thus interpreting the state Constitution, did not pass a law (either impairing the obligation of contracts or otherwise). The court merely interpreted what the statute (constitutional) law was. The court in no sense passed a law; the people of Iowa and her Legislature did that. The law is a mere expression of the legislative intent. The legislative power may in plain terms declare its intent. If not declared in plain terms, that intention must be ascertained by the application of various rules of in-

terpretation. But these rules are merely intended to ascertain the actual legislative intent. What is the actual legislative intent, is a question for the courts and not for the Legislature. This is especially true of the state Constitution. The courts do not enact the state statute laws or pass the laws (impairing the obligation of contracts). "*Jus dicere*" is the province of the courts; "*jus dare*," that of the Legislature.

A certain law is enacted authorizing municipal bonds for public improvements. Certain persons buy the bonds for full value. The public have the money. Without considering the constitutional provision that retrospective laws shall not be passed, the Legislature cannot defeat the bonds by repealing the law authorizing their issue, such repeal being enacted after the bonds were sold and before suit brought on them. The Legislature may conclude that it made a mistake; that it misconstrued the Constitution and had no power to act. After the Legislature pass an act, may the citizen rely on it? May he act under it? It is a question of power. That question of power does not depend on the degree to which it may be exercised. If the Legislature pass a bad law they ought to repeal it. If the Supreme Court of any State make a wrong decision on the Constitution or statute laws of the State, the court ought to overrule it and make a correct decision. Can the honest citizen, aiming to be guided by the law and follow it in every respect, rely on the acts of the Legislature and act under such statute laws as made by the Legislature and interpreted by the courts? May the honest citizen rely on the decisions of the highest appellate court? May he act accordingly?

"The interpretation within the jurisdiction of one State becomes a part of the law of that State, as much so as if incorporated into the body of it by the Legislature. If, therefore, different interpretations are given

in different States to a similar local law, that law in effect becomes by the interpretations, so far as it is a rule for our action, a different law in one State from what it is in the other." [*Christy v. Pridgen*, 4 Wall. 196, 203 quoted in *Union Bank v. Kansas City Bank*, 136 U. S. 223, 235.]

Then, the same statute in the same State, receiving at different times different varied and contradictory constructions, is a different statute at one time from what it is at another. The change is just the same as if written in the body of the act by the Legislature. The Constitution of Iowa at first, in form, authorized municipal railroad aid bonds. The Supreme Court so held. Then the Supreme Court held such bonds were not only not authorized by the Constitution of Iowa, but were in effect forbidden by that instrument. The Iowa Constitution was a different Constitution at one time from what it was at the other time. If Iowa and Kansas had adopted the same Constitution, in the same language, at the same time, then the Supreme Court of Kansas may put one construction on her Constitution and the Supreme Court of Iowa may put a different construction on the Iowa Constitution. The Kansas Constitution and the Iowa Constitution are certainly laws. What is Kansas statute law and what is Iowa statute law (for constitutions are only statutes), are questions for the Supreme Court of each State to determine. Some tribunal somewhere must determine finally and conclusively what is the statute or constitutional law of each State. No one can allege that such construction is erroneous. It is the peculiar province of the Supreme Court of each State to determine what is the statute law of such State.

The Kansas Constitution is different from the Iowa Constitution. They are different laws. They become different laws solely by the differing construc-

tions placed on them by the Supreme Court of each State. It was the Constitution that authorized the issue of the bonds, not the decision of the courts. In the other case, it was Constitution that prohibited the issue of the bonds, not the decision of the courts. Iowa had a different Constitution at one time from what she had at another time.

I beg pardon for suggesting that the matters in controversy in these cases were not thoroughly considered or adjudicated. We first have the Constitution of Iowa, under which, by legislative enactment, municipal railroad aid bonds are issued. Then we have a controversy on the constitutional validity of the statute authority to issue the bonds. The Supreme Court holds that they have such authority. Cases follow and the bonds are sustained. Then the state Supreme Court changes its ruling. They now hold that the bonds are without authority of law. "That was not the law till their honors spoke." No one can say the first decision was erroneous. No one can say the second decision is erroneous, although it is contradictory to the first.

Legislative acts (under our constitutions prohibiting retrospective legislation) are always prospective. Our judicial decisions are always retrospective. Legislative acts declare what the law shall be; judicial decisions declare what the law is and has been. The judgment to express the matters really adjudicated should be thus: Bonds were issued and sold on the market. The bonds were issued and sold after the judicial decision that they were valid and issued by authority. That decision became and was a part of the law and formed part of the contract. If the bonds were not made and bought on the faith of the decision as rendered, then the purchaser has no claim to the protection of the court. The court now holds that these bonds are without authority. Such statute is a different law at the

last decisions from what it was at the first decisions. The last statute does or does not impair the obligation of contracts. The Supreme Court of Iowa held that the Constitution of Iowa did not authorize the bonds. The last Constitution of Iowa impaired the obligation of contracts made under the first Iowa Constitution. In rendering the decision the court must have held that the obligation of the contract was not impaired.

The twenty-fifth section of the judiciary act (U. S. Statutes at Large, vol. I, p. 20, sec. 25, now Revised Statutes of U. S. 1878 (p. 133, sec. 709) is thus: It gives jurisdiction to the Supreme Court of the United States to review judgments of the Supreme Courts of the States in any case "where is drawn in question the validity of the statute of the state [a state Constitution is a statute] as being repugnant to the Constitution of the United States and the decision is in favor of the validity of the statute."

Here in this Iowa bond case, bonds were bought relying on the statute and the Constitution of Iowa and the decisions of the courts. The purchaser lost; he was deceived by both. In his business transactions the honest citizen cannot rely either on the state Constitution or the state statutes or the Iowa courts or the Constitution of the United States or the Supreme Court of the United States. Here we have the Iowa municipal bonds issued by authority (in form at least) of the Iowa statute under the Iowa Constitution. The Legislature and the courts hold the bonds valid. That is the statute. So the Supreme Court of Iowa holds on this Iowa statute. Who shall say that decision is erroneous? Then bonds are again issued after such decision and sold on the market to a purchaser who relies on the Constitution, the statute, and the judicial decisions. In a suit on these bonds in the state court, the court over-

rules its former decisions and holds that the bonds are issued without authority. This is not an erroneous decision. Although one decision may be the opposite of the other, yet each was the law at the time it was rendered. What is the statute? Who can determine this but the court? A void statute is no statute in legal effect.

At the time Mrs. Pennybacker made her deed to Mr. Huntington the deed was valid. This was statute law, so interpreted by the courts of Virginia and West Virginia. Who could say that the Virginia statute did not authorize the deed when the highest judicial tribunal in the State decided finally and conclusively that the statute did authorize it? At the time the Huntington deed was made it was valid; at the trial it was void. At the time the deed was made the statute authorized it; at the time of the trial the statute prohibited it. The Virginia statute declaring this deed valid was a different statute from that declaring it void. The last statute impairs the obligation of the contract made under the first statute. The deed was valid under the first statute and void under the second. Mr. Huntington lost his land under a deed, valid by statute when he took it, and void by statute at the trial. The court should have determined what was the statute when the deed was made and what was the statute at the trial. If the statutes varied, then the question to be considered would be, when was the contract made? The last decision is the one to be relied on. In this way the citizen may rely on the United States and state Constitutions, the Legislatures, and the United States and state courts. He may accordingly buy lands or bonds or make any other contracts. As it is, the honest citizen cannot place any dependence or rely in any degree on the Constitution of the United States or of the State,

or the state statutes, or the decisions of her courts, or even of the Supreme Court of the United States.

It is the peculiar province of the Supreme Court of any State to declare what is the statute law of that State and what is the Constitution of that State. And when the decision is made, then that is or is not the Constitution or statute law of such State. The decision interprets the Constitution and statute, the decision does not make the Constitution or statute. The statute law in force when the bonds are sued on may forbid what was authorized and done when the bonds were made.

In *Township of Pine Grove v. Talcott*, 19 Wall. at 677, the court say (quoted heretofore):

"The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgments of the courts of the State where the cases arise. It must hear and determine for itself. *Here commercial securities are involved.*"

It must not be forgotten that these "commercial securities" are not claimed under any general common law. This writer has yet to find a case anywhere reported in the books holding that the general common law authorized a local tax without the aid of any statute, or that by general common law without statutory aid any municipal corporation could execute negotiable municipal bonds. May the States legislate on the subject of "negotiable securities?" May the state Supreme Court interpret such statute laws so enacted on the subject of "negotiable securities?"

If the Supreme Court of the United States are not bound by the interpretation of the state statute or Constitution made by the state Supreme Court, then they are not bound by the state Constitution or the state statute, for that interpretation is the statute and that is the Constitution.

In *Central Land Co. v. Laidley*, 159 U. S. 103, if the assignment of errors had pointed out the error that the statute at the time the deed was made was a different statute from that in force at the trial, then there would have been presented the question whether the Virginia statute (as last interpreted which was correct) impaired the obligation of the deed (contract) made under the former decision (which was correct) construing the statute (which construction was correct). But the assignment of errors does not proceed on this theory. In one point it assumes that the Virginia statute in force at the time the deed was made authorized the deed. This was correct. No one could deny it. The grantee bought the land, made his contract and paid for the land when this was undisputed law. At the trial the deed was without authority and conveyed nothing. This was the statute law at the trial. The decision so holding is not erroneous. The first series of decisions on the Virginia deeds was correct; they were not erroneous; the second series of decisions made by the Virginia Supreme Court were correct, but the assignment of errors says they were erroneous. The Virginia statute never changed. This is not true in fact or law. The Virginia statute that made this deed valid is a different statute from the Virginia statute which made this deed void. It was the statute and not the decision which made the deed void.

Of course, all suits on municipal bonds in Iowa, as well as elsewhere, are brought in United States courts, where the courts hold that the municipal bonds are issued by valid state constitutional authority, and not in the state courts where the holding is that the municipal bonds are without state constitutional authority. Such bonds would not stay in Iowa. That they left the State was a matter to be expected. Here are two sets of decisions on the Iowa Constitution. The first series of de-

cisions holds that the Iowa Constitution authorizes municipal bonds, and the second series that the Constitution does not give such authority. Both are correct; neither is erroneous. The United States courts holds the second series of Iowa decisions erroneous and the first series without error. The State courts hold the first series erroneous and the second series without error.

As far as the Constitution of the United States is concerned, in its provision that no State shall pass a law impairing the obligation of contracts, both courts have fallen into error. If the Legislature make a bad law they should repeal it, but not so as to effect contract rights acquired under it. If the courts make an erroneous decision, they should correct it, but not so as to effect contract rights made under the law as interpreted when the contract was made. United States courts now hold that the state Constitution of Iowa authorizes bonds, and the state courts that the bonds are prohibited. The United States courts decide and continue to hold that the second series of state decisions are erroneous and will doubtless continue to so hold *ad infinitum* even as to bonds issued after the second series of decisions in the state courts had been made. United States courts are not bound by the decisions of state courts on state statutes and state constitutions where negotiable securities are concerned, and on negotiable securities it is to be inferred that state statutes and state constitutions will be disregarded. The negotiable bond market dominates state Supreme Court decisions, state statutes and state constitutions. It accomplishes their complete overthrow.

Every state must make its own constitution and statute laws and there must be some tribunal somewhere—some judicial tribunal where such constitution and statute laws are authoritatively interpreted and

determined. If the Supreme Court of the United States may disregard the judgments and decisions of the highest judicial tribunal of the states affecting the interpretation and construction of state constitutions and state statutes, then they may disregard the state constitutions and state statutes. There can be no middle ground. The Supreme Court of Michigan determined that municipal bonds were prohibited by her constitution. Notwithstanding such decision municipal bonds were issued and sold on the market.

If Michigan should adopt a constitution, prohibiting *in toto* the issue of municipal bonds, would that express constitutional prohibition meet with any other or different fate from that of her old constitution and the judicial construction put on that constitution by the highest judicial tribunal in the State?

The special tax-bill is the superior of the municipal bond. The municipal bond is valid only in the hands of the purchaser for value before maturity without notice, but the special tax-bill is valid in the hands of the original wrongdoer even if injurious, ruinous consequences follow the prohibited acts for which the tax-bills are issued. All public improvements are made under contracts—just as much contracts as municipal bonds. These contracts are under the protection of the Constitution of the United States. Our courts can not hold them invalid even if they damage or destroy property. *Quo vadimus?*

The question is discussed at some length by the Supreme Court of Missouri (October term, 1905), in the case of *Sedalia to the use of The Sedalia National Bank v. Donahue*, 190 Mo. 407, et seq. The bank bought certain tax-bills, relying on certain appellate court decisions as to the city's power to issue them. The bank in making the purchase relied on certain appellate court decisions, an appellate court which has done much to

confine municipalities to the enforcement of the statute laws of Missouri. The bank in making the purchase relied on court decisions and was deceived, and the Supreme Court affirmed the deception.

The court holds, as the Virginia court and the Supreme Court of the United States holds, that the same statute which authorizes the tax-bills prohibits them. The court refer to *The Central Land Company v. Laidley*, 159 U. S. 103.

The Virginia statute made the Huntington deed valid when Mr. Huntington paid for the land and took the deed for it, relying on the statute and the decisions of the courts of Virginia. The Virginia statute prohibited that deed after it was made. The same statute that made the Huntington deed valid, prohibited it and made it void. And yet the Virginia statute did not impair the obligation of this contract (Huntington's warranty deed)!

This last Missouri decision teaches one important lesson to all people who are in business. You cannot safely rely on judicial decisions. The courts are not to be trusted. The old maxim, "*Interest Reipublicae ut sit finis litium*," has been changed to "*Interest Reipublicae ut sit finis litium non*," putting the most important word, "non," last, so that the memory may linger long on that which is most important.

Has the blind goddess of Justice become a street-walking strumpet?

CHAPTER 15.

CONCLUSION.

In conclusion the writer would ask the property-owner, the reader, the citizen, to reflect on the matters referred to in this book. The accumulations of a lifetime are at stake. The home of yourself, your family and children are at stake. That home may be taxed one hundred per cent of its value and sold to pay the cost of doing it a damage prohibited by the Constitution, and the courts can afford you no relief. If the property-owner make resistance in the courts or elsewhere, the modern law puts him in the disagreeable position of one who has received a large benefit from public work, and in refusing to pay for it he is despicable, contemptible and vile, to be shunned by all good (self-styled progressive) citizens. It is the stop-thief cry of the centuries. It is part and parcel of the divine right of kings. "The king can do no wrong." The common council cannot by their acts damage private property for public use. Their determination that their public improvements benefit the citizen cannot be disputed, even when the proposed benefit is a damage ten times the amount of the cost. The Constitution as judicially interpreted declares the incendiary's torch a benefit.

The legislative power is always aggressive. It is the power which threatens to "Draw within its impetuous vortex all other powers of the government." Here our common councils have absolutely unlimited powers over the real property of the citizen. If they may under laws passed by constitutional authority, have and exercise this unlimited power over real property, they

may by legislative enactment have and exercise this unlimited power over personal property, and all other property unfortunately subjected to its power.

By an act of the Missouri Legislature, approved April 14, 1905 (Session Acts or Laws of Missouri 1905, pages 282-291), land may be taxed for a road to the extent of \$100 per acre. This is merely one step further in the wrong direction.

There is absolutely no limit to the amount of the tax.

A two hundred per cent local tax may be levied on the full value of land and a two hundred per cent tax on the full value of the benefit conferred without any violation of the fourteenth amendment to the Constitution of the United States. That amendment was not designed to secure such "delusive exactness." [*Louisville and Nashville R. R. Co. v. Barber Asphalt Paving Co.* (A. D. 1905), 197 U. S. 430, and cases cited on page 434.] The Kentucky statute referred to provided that "The courts in which suits may be pending shall make all corrections, rules and orders to do justice to all parties concerned." But the courts hold that they cannot make corrections of legislative enactments.

Some have said that the courts and judges are corrupt and vicious. I do not believe it. This assertion is a serious error. Courts and judges are and have been sincere and honest, and in consequence thereof the damage has been greater.

Sir William Blackstone has told us that the objects for the consideration of the laws of England are two fold: first, persons; second, things. The Supreme Court of the United States, at December term, A. D. 1856, in case of *Dred Scott v. Sandford*, 19 Howard 393 to 633, decided that a black person was not a person at all, but a mere thing. The black man had no

more capacity to sue than a horse or a sawlog or other inanimate object. This decision gave to any white man the right to call the roll of his slaves at the foot of Bunker Hill monument or in Illinois, notwithstanding the Constitution of Massachusetts and of Illinois had declared that black persons were persons and not things, and that slavery did not exist and should not exist. In 1834 Dred Scott, a Missouri slave, was taken to Illinois (he did not *escape there*) and remained there for two years. He was a slave notwithstanding the Constitution of Illinois prohibited slavery. We have the exact counterpart in Missouri and other States. Our Constitution prohibits damaging private property for public use without just compensation. And yet nearly every one of these States authorizes a local tax on damaged property (the damaging being expressly prohibited by the Constitution) to pay the cost of the forbidden damage. Notwithstanding this act (damaging) is prohibited, still courts imply a power to tax the damaged property for doing the prohibited act. Slavery existed in Illinois notwithstanding her Constitution prohibited it. Property can be damaged in the States notwithstanding the state Constitutions prohibit it. And the courts enforce the law of slavery and the law of valdalism and robbery alike, notwithstanding state constitutional prohibitions, however absolute such constitutional restrictions may be.

State legislatures and state courts seem to have had little difficulty in breaking through the cobweb chains of paper constitutions. Nine years after the decision was rendered in *Dred Scott v. Sandford*, the thirteenth amendment to the Constitution of the United States abolished slavery (in form at least) in all the United States. The fourteenth amendment followed soon.

Our courts decided at an early day that legisla-

tive divorces were unconstitutional. Such divorces impaired the obligation of contracts; they were retrospective in their operation and such legislative divorces were an exercise of judicial power by the Legislature in conflict with that provision of the Missouri Constitution that the powers of the government were divided into three distinct departments, each of which should be confided to a separate magistracy, and no person charged with the exercise of powers properly belonging to one department should exercise any powers properly belonging to either of the other departments, with very limited exceptions, and the exceptions strengthen in cases not excepted. We have seen the repeated attempts to overthrow the Constitution by repeated legislative divorces, the state Legislature claiming the unlimited powers of the English Parliament notwithstanding our constitutional restrictions and our judicial decisions. The Missouri Legislature for a long series of years defied the Constitution and the courts until the Missouri Constitution of 1865 in terms prohibited divorces by legislative act. It must be now left to the courts to be decided on notice and hearing and an opportunity to be heard.

The reader cannot fail to notice the long continued and persistent effort on the part of state legislatures and state courts to overthrow state constitutions and restrictions and substitute the English Constitution and the unlimited powers of the English Parliament.

On special tax-bills and municipal bonds no change can now be made in state Supreme Court decisions. The Constitution of the United States prevents any change of this state statute and this state Constitution by legislative act or judicial decision, or even an amendment of the state Constitution as to bonds or tax-bills in force under the present state constitutions and

the present statutes. This prohibition is accomplished under that clause of the Constitution of the United States which prohibits the States from passing laws impairing the obligation of contracts. Local taxes were held unconstitutional if the work for which the taxes were levied was a general benefit only to the property taxed; now the tax is valid if that work done for which the tax is levied be a damage to the lot to the extent of ten times (or more) the cost of the work. The tax is valid to the extent of one hundred per cent of the damaged property, or to the extent of the whole value of the property when it is no benefit whatever to the property taxed. The state courts in all the States now hold such taxes valid. They cannot now hold them void and thus impair the obligation of the contractor's contract to make the improvement. There is just as much power to make the tax-bill as there was to make the municipal bond. Even in the hands of the innocent purchaser for value without notice, before maturity, the municipal bond is comparatively harmless. The public pay a general tax and get nothing for it, but in case of the special tax-bill the taxpayer must in addition suffer the loss in having his property damaged. He may be compelled to pay for the vandalism to the extent of the entire value of his land. It is no answer to say that the city or town corporation may be sued for the tort and "just compensation" for damaging may be recovered. The owner may bring replevin against the horse thief for the stolen horse, but he is not bound to pay the thief's costs and expenses. But the lotowner is bound to pay the lot thief his costs and expenses. The state Constitution is the lot thief's only refuge. The contractor for public work under his contract has a right to the tax to the extent of the whole value of the property, together with the whole value of the improvements thereon, even if the work occasion the

property-owner a damage. The state courts in all the States now hold such special taxes valid. They cannot now hold them invalid. To do so would give us different charters, different laws, different constitutions, from those in existence at the time the public improvement contracts were made. We have court-made constitutions and court-made statutes. But the courts (no more than the legislatures) cannot change the statutes (by giving them a different interpretation and construction) so as to affect precedent contracts. The courts (no more than the people themselves acting under the forms of law) cannot now change the state Constitution so as to affect contracts made under the Constitution. The courts cannot make that change by giving the Constitution a different construction and interpretation. The state Constitution is a law. To say what the law is in a given case is of the very essence of judicial duty. The Constitution is a different Constitution at one time under one construction and interpretation from what that Constitution is at another time under another and different construction and interpretation.

The evil consequences are alike in both cases. The property-owner must pay the special tax without an equivalent in the form of the special, peculiar, exceptive benefit or lose his property. If the property-owner be successful in the defeat of the tax in court, then the contractor loses his time, labor and materials. In either case the public reaps the profit in getting the street made or improved or other public improvement. The city gets the street for nothing except that in this robbery of the property-owner or contractor it pays the salary of its own employees—in the robbery it pays off its hired hands.

Either the property-owner is robbed of his real estate or the contractor of his labor and material. The

city gets the public improvement without cost or price. If, under such circumstances, public improvements are not made, the failure cannot be attributed to a lack of power or authority in the city government. The real culprit is easily discovered. It is *the king, the public* (the city represents the public). It is "*the king's highway. The king improves the street.*" The king authorizes his servant to take the first real estate he finds, that adjoining his work, and sell it to pay this servant for improving "the king's highway."

"The King can do no wrong." It is the old doctrine of the "divine right of kings." The real estate owner may be ruined by an enormous tax for a work which occasions the ruin of his property; the property-owner has no recourse. The contractor may find that the abutting real estate is not of sufficient value to pay the tax against it. The contractor may thus lose part of his just dues and the landowner all of his land, but the public reaps the benefit and pays nothing. A local tax without the landowner's consent in writing should never be allowed to be levied to an amount exceeding the special, peculiar, exceptive benefits added to the property taxed by reason of the proposed improvement. Whether a local improvement is a peculiar, special, exceptive benefit to abutting property and how much, should be a judicial question for the courts with the requirement in the law that the public authorities must prove the fact and amount of benefit. The question of the value of the public improvement to the public (when it is proposed to be done by local tax) should be a judicial question, and if the public improvement is not worth its cost its construction should not be allowed without the consent in writing of the abutting landowners.

The Constitution should be restored to what it was prior to its judicial overthrow. This should be "a tax

on benefits." And the tax should not exceed the benefits, special and peculiar, to the property taxed. Local taxation without special benefits was at one time confiscation, forbidden by our constitutions. No legislative power on earth should be allowed, without the owner's consent in writing, to absorb the whole value of a person's property in the interest of the public, without rendering a full equivalent. The legislative power that takes or taxes should not be permitted to determine values or benefits or damages.

If, in doing a public work (as for instance grading a street as in *Keith v. Bingham*) the legislative power may determine that the work is a benefit to the individual and tax accordingly, then what is a benefit to the individual cannot be a damage to him. There can be no just compensation for damaging private property for public use when that property is benefited, as determined by the Legislature in the exercise of the power of taxation. There is nothing left for the court and commissioners or court and jury to pass on. There is nothing left for the Constitution to operate on. If the legislative power may take one dollar above the special benefit, that power may take the whole property, the entire fortune of the owner.

The plain intent of the Constitution is, that "the just compensation" shall be paid in advance, including "just compensation" for taking or damaging. The property-owner must be paid in advance. This plain constitutional right is openly violated without any means of redress.

In *Keith v. Bingham*, 100 Mo. 300, et seq., it was admitted that the property was damaged by grading May street. There was no just compensation made or paid to any one. Payment was not made in advance as required by the Constitution.

It was not necessary to comply with the Constitution.

In *McQuiddy v. Smith*, 67 Mo. App. 205 (A. D. 1896), the court held, page 208:

"It was not intended by the provisions of the charter of 1889 (Kansas City) to make the assessment of damages and benefits for grading a street a condition precedent to the authority of the city to order the improvement and assess the cost thereof to the abutting property. The purpose of article 8 was to prepare a way by which the city could have settled beforehand the damages to be incurred by the proposed improvement, so that it might be advised in advance whether or not it was proper and for the public good to prosecute the work."

The Constitution requires payment of just compensation in advance. The Kansas City charter gives the city government the option to comply with the Constitution and pay in advance or do the forbidden work in violation of the Constitution and let the landowner sue. The court merely interpreted the Kansas City Charter. Whether it is constitutional to take property for public use without just compensation in advance, or damage property for public use without payment in advance, is not discussed. The Court of Appeals had no jurisdiction over that or any other constitutional question.

If the act of the city was rightful according to the Constitution, how could Mrs. Smith get judgment against Kansas City for \$2,750? If it was wrongful how could the city compel Mrs. Smith to pay for it? The evident meaning of the Constitution was to require payment in advance. The public must ascertain and pay just compensation in advance. In the event that any public authority should either take or damage private property for public use without payment in

advance, then the landowner should be entitled under the Constitution to treble damages. I know this may to some appear harsh, but if the citizen have a constitutional right, it ought to be secured to him by such sanctions as will cause that right to be respected. Private property should not be taken or damaged for public use without just compensation paid in advance, and in the event of taking or damaging without payment in advance, then the person or corporation that takes or damages should be liable to treble damages. Ascertain just compensation by jury, and then require the court to enter judgment for three times the amount. Restore to the citizen the right to hold property honestly acquired by him. That constitutional right consists now entirely of sound.

The history of railroad and road construction is familiar to the people of Missouri and other States. General taxation in Missouri and other states is limited by constitutional restrictions. It is so limited as not to exceed a certain per cent of the assessed value, being five per cent in Missouri. A tax in excess of five per cent on assessed values is not to be tolerated—a debt in excess of five per cent of the taxable property is not to be tolerated (for a debt must be paid by a tax). The Constitution prohibits any tax or debt in excess of five per cent of the assessed values. Railroads and roads may double or treble or quadruple the value of property, yet taxation—general taxation—is prohibited above five per cent.

The state Legislatures have been prohibited from building railroads and roads, or lending state aid on that account or making bonds. The legislative judgment was not to be trusted. Counties, cities, towns, villages and unorganized strips of land issued, under legislative enactments, municipal bonds for roads and railroads. The official judgment of these public offi-

cers was mistrusted and these authorities were limited by the requirement of a popular vote. This proved ineffectual, and the power was taken away entirely. These restrictions and prohibitions were made because, under the best judgment of state legislatures, county courts, city, town and village governments, we had ten-cent railroads for dollar taxes, or no railroad or road at all.

But in all the long continued municipal bond litigation in all the states we fail to meet a case where the property-owner had to pay a tax to damage his own property. Now, in Missouri a municipal bond debt exceeding five per cent of the assessed value of the property cannot be created under the state Constitution even with the consent of every voter, notwithstanding the fact that the work for which the debt may be incurred shall double and treble the values (the sale values) of all the lands and property in the municipality. A like limitation should apply to local taxation. No difference how great the benefit, the tax or debt should not exceed five per cent of assessed values. The debt runs for twenty years.

Real estate in our cities, towns and villages has increased in sale value from one dollar and twenty-five cents per acre to five and even ten thousand dollars per front foot, but that increase in sale value was not due to tax-bills. Even if the benefit be one hundred per cent or two hundred per cent or three hundred per cent, yet the tax cannot exceed five per cent. This is the constitutional rule for general taxation. Be liberal and make your constitutional rule provide that the special tax shall not exceed twenty-five per cent of the assessed value. No difference how great in amount the special benefits may be, fix the rule at twenty-five per cent, five times the amount allowed by the Constitution in general taxation. Our counties, cities, towns

and villages should cease to be "*get rich quick*" corporations.

Five per cent of the assessed value of property is the utmost debt-making power. This is "the ultima thule" beyond which we cannot go. When work has been done on a street without the consent, in writing, of the landowner, and that work does not damage abutting property and does not benefit it, there should be no special tax against it. State constitutions now provide certain restrictions in the interest of private property. These restrictions are designed for the special protection of the property-owners in enabling them to hold their property. Our constitutions provide (by implication in some cases and in express terms in others) that private property shall not be taken for private use except in the limited number of cases of private ways of necessity, and then compensation must be rendered. In 1856 this was an implication in the Missouri Constitution (*Wells v. Weston*, 22 Mo. 384). Now in Missouri it is an express prohibition. Under present constitutional law, wherever there is a constitutional restriction or prohibition in favor of the person or his property, there the State may nevertheless do the prohibited act, or authorize any of its subdivisions, its cities, towns and villages, to do the prohibited act; and acting under such authority they may do the prohibited act and then levy a special tax against the very property damaged which was designed to be protected by the prohibition, and the tax for that act is a valid tax, notwithstanding the act was prohibited. The Constitution must go further and in terms prohibit both the act and all power to tax the injured person or property on account of the prohibited act.

Dred Scott was taken by his master to Illinois as a slave and held there as a slave for two years, and he still remained a slave notwithstanding the Constitution

of Illinois prohibited slavery. Slavery *did* exist in Illinois notwithstanding her Constitution prohibited it. The Southern slaveowner had the right to take his slaves to Massachusetts and there use them as he used any other property—he had the right to call the roll of his slaves at the foot of Bunker Hill monument, notwithstanding the Constitution of Massachusetts prohibited slavery.

Prior to 1860 this tax, this local tax, could in no case be laid without this special, peculiar, exceptive benefit. To so levy this local tax without the special benefit was confiscation which was merely one of the ways of taking the citizen's property for public use, prohibited by the Constitution.

One case decided in the Supreme Court of Missouri in June, 1906 (*State ex inf. Hadley v. Peoples United States Bank, Spencer Receiver, Appellant*) seems to indicate that this inroad on the constitutional rights of the citizen may have a limit. In that case the attorney-general had proceeded against the Peoples United States Bank under local statutes, a receiver had been appointed, he was duly qualified, gave bond and took possession of the assets of the bank and had paid a large amount of the debts of the bank; then the court determined it had no jurisdiction and entered the appropriate judgment and the receiver was directed to deliver all the property and assets to the bank, and make and state his account. He did so and the court approved his accounts. He asked an allowance of \$12,100 for his services. That was refused. He paid the money into court and filed his motion for allowance of fees for his services. The court allowed \$2,500 for seven days work, \$500 for attorney's fees and \$150 for additional attorneys fees, total \$3,150 fees. The amount was allowed, but as costs generally, and the receiver insisted that the amount should be

paid out of the funds in court and not as costs generally. The receiver claimed that the order was erroneous on two grounds, first, the amount was too small, second, the charge should have been against the funds in court. These funds were benefited by the receiver's acts. Debts were paid and such payment was affirmed by the bank. More than two and one-half millions had passed through the receiver's hands. He had given a large bond at large expense. The court, at page 613, say:

"We are referred to authorities which hold that as a general rule the receiver is entitled to his pay out of the funds in his hand, regardless of what the final judgment on the merits of the case may be, and we are prepared to accept that as a general rule, with the qualifications we have hereinabove mentioned. But we have not been pointed to any authority which holds that, where there was absolutely no justification in the act appointing a receiver, and the act was in its nature to the injury of the defendant, he should nevertheless pay for the injury that was done him, and if there are such authorities we do not care to see them."

There can certainly be no justification (except, perhaps, the decisions of all our state supreme courts) for paying the costs of damaging private property for public use out of the property damaged. But here it seems the court refused to pay the cost (of damaging these bank funds) out of the damaged bank funds. The bank was not bound to pay for damaging its property, its credit, its good name, by having a lien fastened on its property.

Although millions were not involved in Mrs. Smith's case here in Kansas City, that lady might appropriately ask the court why she was compelled to pay \$300 (67 Mo. App. 205) for damaging her property to the extent of \$2,750 (128 Mo. 23). Was it because a

state Constitution is of less consequence than the general common or statute law?

Under modern state constitutions, *individual* rights were supposed to have been protected. No man's property shall be taken or damaged for public use without just compensation ascertained by court and jury or court and commissioners in advance and paid in advance. But now state constitutions dispense with the special, peculiar, exceptive benefit—they dispense with the general benefit and with arch fiendish boldness acts of taking and acts of damaging are done and the wronged citizen is taxed with the cost of taking or damaging his own property, notwithstanding such acts were prohibited by the Constitution. If God's government be just, state constitutions with such moral leprosy in them ought not and cannot long endure. Our constitutions cannot reverse the judgments and decrees of the Almighty. There may be apparent prosperity but it is not real. Our people in our cities, towns and villages are walking through the graveyard, whistling to keep their courage up. That which is taken to be healthful life and vigor is not real; it is the death rattle. It is an invitation to a Belshazzar's feast where sooner or later will appear the fatal handwriting on the wall.

Restore the Constitution. Make it possible for the honest citizen to hold and use his property in spite of anything that may be done by the Empsons and Dudleys, the Dantons, the Robespierres and Marats of modern times.

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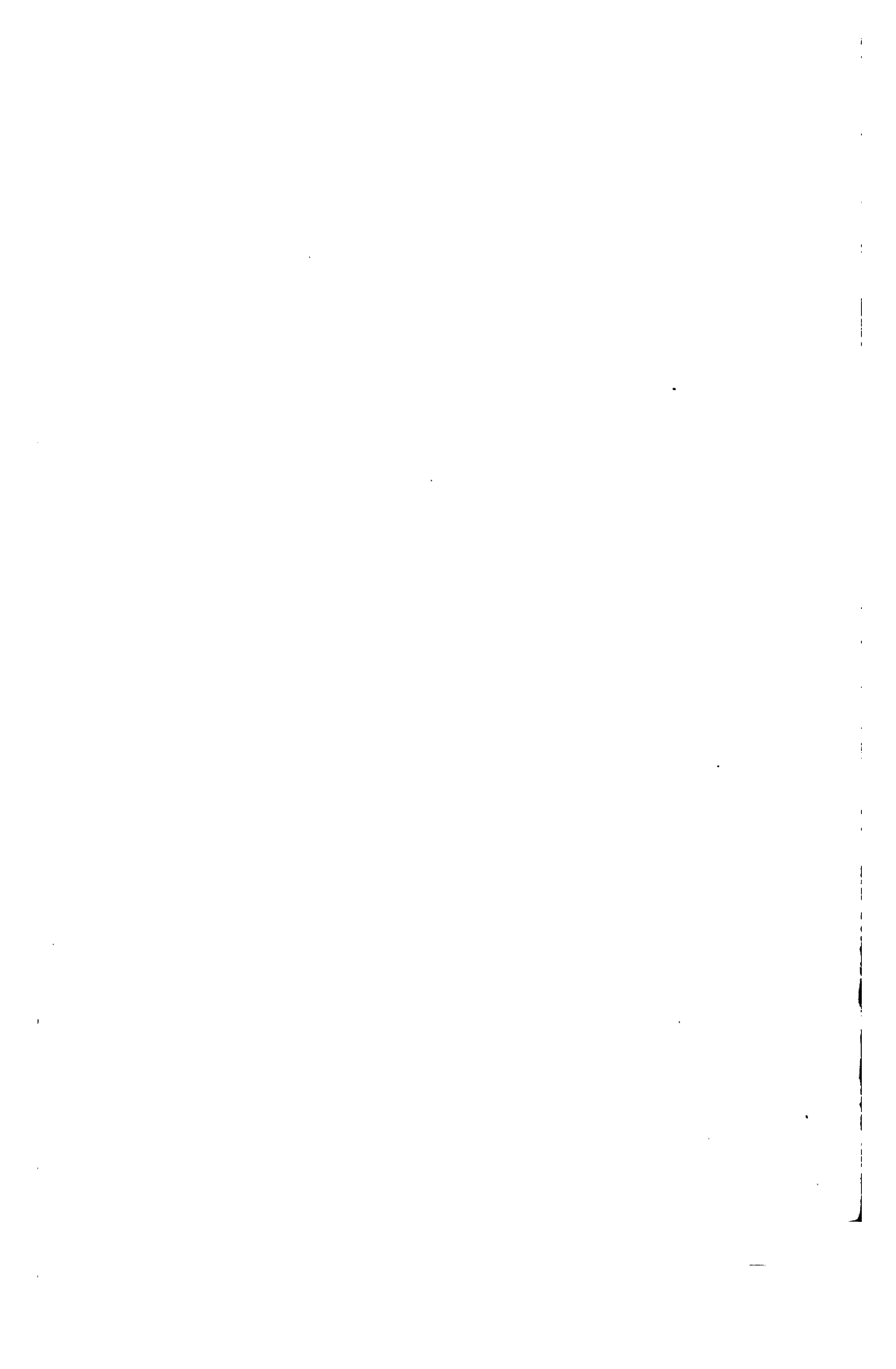
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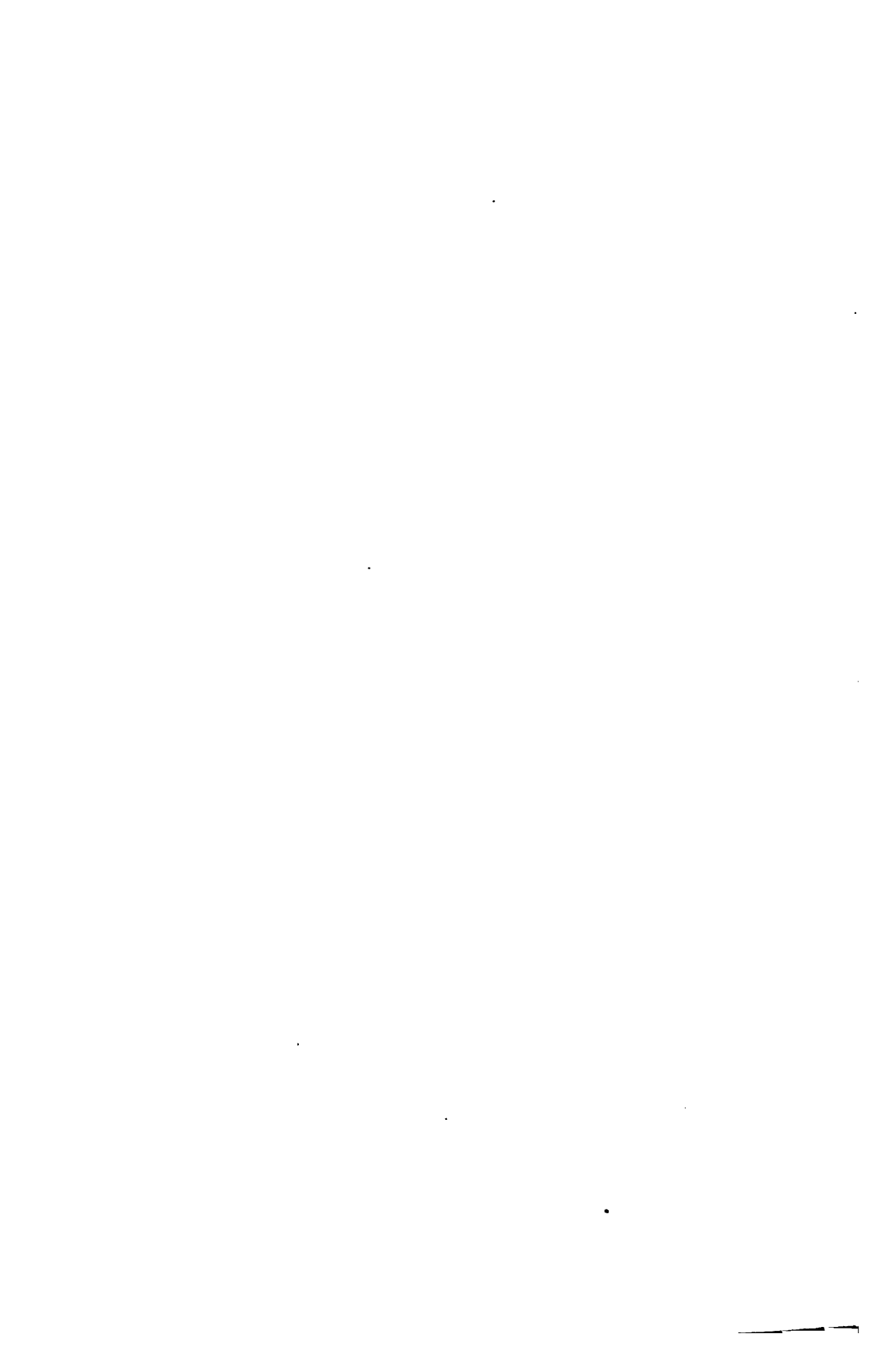
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